1959
33

61 - 29147

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

IRVING YUDITSKY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

237 I.A. 621

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

An information was filed by leave of court, charging that the defendant "being the bailee of $14 lawful money of the United States of America, the property of Coyne & Nevins, a corporation, did unlawfully and fraudulently convert the same to his own use." The defendant waived his right to a trial by jury and the matter was submitted to the court, and after a hearing the court found the defendant guilty "of larceny of property of the value of Fourteen Dollars ($14.00) in manner and form as charged in the Information herein" and imposed a sentence that the defendant be confined thirty days in the House of Correction and fined in the sum of One Dollar.

The evidence discloses that Coyne & Nevins was a corporation engaged in the egg business and from time to time sold eggs to the defendant on an open account; that the defendant would make payments on account of the eggs every two or three weeks; that in the month of October, 1923, the defendant called upon Coyne & Nevins and made them a payment on account,

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

ERROR TO

v.

MUNICIPAL COURT

OF CHICAGO.

DAVID KONTNEY,

Plaintiff in Error.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

An information was filed by leave of court, charging that the defendant "during the ballot of the lawful money of the United States of America, the property of Doyne & Nevins, a corporation, did unlawfully and fraudulently convert the same to his own use." The defendant waived his right to a trial by jury and the matter was submitted to the court, and after a hearing the court found the defendant guilty "of larceny of property of the value of Fourteen Dollars ($14.00) in manner and form as charged in the information herein" and imposed a sentence that the defendant be confined thirty days in the House of Correction and fined in the sum of One Dollar.

The evidence discloses that Doyne & Nevins was a corporation engaged in the egg business and from time to time sold eggs to the defendant on an open account; that the defendant would make payments on account of the eggs every two or three weeks; that in the month of October, 1923, the defendant

giving them $82.00 in cash and a check for $17.83 which was drawn by one Cheefus, payable to the defendant and by him endorsed; the check being given to the defendant by Cheefus in payment of eggs, which the latter purchased from him. Coyne & Nevins deposited the check in their bank, but a few days afterwards it was returned unpaid to them on account of insufficient funds. The evidence further shows that upon receipt of the check by them from their bank, they called up, on the telephone, the maker of the check and informed him of the fact that it had been returned unpaid and the maker of the check, Cheefus, said that he would give a new check for the same amount, if some one would call upon him for it; that afterwards, the following day, the defendant called at Coyne & Nevins and was informed of the facts in regard to the check and he stated that he would take the check and get the cash from Cheefus. Thereupon Coyne & Nevins gave the check back to the defendant who afterwards took the matter up with Cheefus and the latter paid him two or three dollars at a time until the $17.83 was paid. The evidence further shows that when the check was returned by Coyne & Nevins to the defendant, they charged him with this amount upon their books. The evidence further tends to show that the defendant again called at Coyne & Nevins' place of business and when asked about the money, stated he had collected it, but had used it to buy a suit of clothes. It further appears from the evidence that the defendant owed Coyne & Nevins more than the amount of the check and that demand was made upon him for the amount which he owed them which included the amount of the check.

giving them $20.00 in cash and a check for $17.50 which was drawn by one Cheatham, payable to the defendant and by him endorsed; the check being given to the defendant by Cheatham in payment of wages, which the latter purchased from him. Coyne & Devine deposited the check in their bank, but a few days afterwards it was returned unpaid to them on account of insufficient funds. The evidence further shows that upon receipt of the check by them from their bank, they called up, on the telephone, the maker of the check and informed him of the fact that it had been returned unpaid and the maker of the check, Cheatham, said that he would give a new check for the same amount. If some one would call upon him for it; that afterwards, the following day, the defendant called at Coyne & Devine and was informed of the facts in regard to the check and he stated that he would take the check and get the cash from Cheatham. Thereupon Coyne & Devine gave the check back to the defendant who afterwards took the matter up with Cheatham and the latter paid him two or three dollars at a time until the $17.50 was paid. The evidence further shows that when the check was returned by Coyne & Devine to the defendant, they charged him with this amount upon their books. The evidence further tends to show that the defendant again called at Coyne & Devine's place of business and when asked about the money, stated he had collected it, but had used it to buy a suit of clothes. It further appears from the evidence that Cheatham and Coyne & Devine more than the amount of the check and that demand was made upon him for the amount which he owed, then and there included the amount of the check.

The charge against the defendant was that he was guilty of violating Sec. 170 of the Criminal Code, which provides: "If any bailee of any bank bill, note, money or other property shall convert the same to his own use with intent to steal the same, or secrete the same with intent to do so, he shall be deemed guilty of larceny." Under this statute if the evidence disclosed that Coyne & Nevins entrusted the check to the defendant for the purpose of having him collect the money for them and turn it over to them, he might be guilty of a violation of the statute, but we think upon a careful consideration of the evidence in the record, that this was not done, but that Coyne & Nevins returned the check to the defendant and were holding him for the amount of it, because they charged him with this amount upon their books, and in subsequent statements sent to him, the amount of the check was included in a larger amount which he owed and which they demanded that he pay. The effect of what was done by Coyne & Nevins in returning the check to the defendant, was to wipe out the credit which they had given to him for the check and to treat the matter as though he had never given them the check. We are clearly of the opinion, upon a consideration of all the evidence, that it does not warrant the finding that the defendant was guilty and the judgment of the Municipal Court of Chicago is, therefore, reversed.

REVERSED.

THOMSON, J. AND TAYLOR, J. CONCUR.

The charge against the defendant was that he was guilty of violating Sec. 170 of the Criminal Code, which provides: "If any bailee of any book will, note, money or other property shall convert the same to his own use with intent to steal the same, or secrete the same with intent to do so, he shall be deemed guilty of larceny." Under this statute if the evidence disclosed that Cayce & Davies entrusted the check to the defendant for the purpose of having him collect the money for them and turn it over to them, he might be guilty of a violation of the statute, but on taking upon a careful consideration of the evidence in the record, that this was not done, but that Cayce & Davies returned the check to the defendant and were holding him for the amount of it, because they charged him with this amount upon their books, and in subsequent statements sent to him, the amount of the check was included in a larger amount which he owed and which they demanded that he pay. The effect of what was done by Cayce & Davies in returning the check to the defendant, was to wipe out the credit which they had given to him for the check and to treat the matter as though he had never given them the check. We are clearly of the opinion, upon a consideration of all the evidence, that it does not warrant the finding that the defendant was guilty and the judgment of the Municipal Court of Chicago is, therefore, reversed.

REVERSED.

THOMSON, J., ADMINISTRATOR, J., DISSENTS.

6 - 29176

J. O. NESSEN,

Defendant in Error,

v.

CHARLES HORN,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

237 I.A. 621

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On June 25, 1920, J. A. Nessen filed his bill of complaint in the Circuit Court of Cook County against Charles Horn. Ten days prior thereto, Horn had filed his bill against Nessen in the same court. On November 10, 1920, an order was entered consolidating the two causes and after the pleadings were settled in both cases, the consolidated cause was referred to a master in chancery to take the proofs and make up his report. This the master did, and said in his reports that he had treated the two causes of action as one consolidated cause, but he further stated that if the bill filed by Nessen should be treated as a separate cause, he recommended that it be dismissed for want of equity, because Nessen had submitted no proof to sustain the allegations of his bill.

Afterwards on April 18th, 1923, on motion of the solicitors for Nessen, an order was entered by the Circuit Court dismissing Nessen's bill for want of equity at his costs. On the next day Nessen's solicitors made a motion to

vacate and set aside the order of April 18th and that an order be entered dismissing Nessen's bill at his costs, which was accordingly done, an order entered to that effect.

Counsel for Horn contends that the chancellor was not warranted in entering the order of April 19, 1923, but that the order of April 18, 1923, should stand as that order disposed of Nessen's bill on its merits.

We have this day handed down an opinion in the consolidated cause of Horn against J. O. Nessen Lumber Co., et al, No. 28992, wherein the facts in regard to the pleadings and the stipulation of the parties that the two causes be consolidated are sufficiently set forth so that it is unnecessary to again state them here.

We think it was error to enter the order of April 18th, dismissing the Nessen bill for want of equity, because the merits of his bill were disposed of in the consolidated cause, and since the decree in the consolidated cause was entered of record in the suit filed by Horn against Nessen, it was necessary to make some disposition of the bill filed by Nessen against Horn, so that the record would disclose that that case had been disposed of. In these circumstances, we think it was entirely proper to enter an order in the Nessen case, dismissing it at complainant's costs, as was done, and the decree of the Circuit Court of Cook County is, therefore, affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

134 - 29233

JOSEPH GENTKOWSKI and
JULIA GENTKOWSKI,

Appellees,

v.

PAULINE SIELSKI,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

237 I.A. 621

Opinion filed Feb. 11, 1935.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible detainer against the defendant to recover possession of the premises known as No. 3357 North Ridgeway Avenue, Chicago. There was a finding and judgment in plaintiff's favor and the defendant appeals.

The record discloses that the defendant and her husband, Joseph Sielski, had been occupying the premises for three or four years before the instant case was commenced. The evidence tends to show that Joseph Sielski was the tenant under a written lease from Mrs. Bauer, his mother-in-law, although the lease is not in the record; that afterwards she died, and there appears in the record what purports to be a lease of the premises in question executed by the Administratrix of Mrs. Bauer's Estate to Joseph Sielski, dated January 26, 1930, covering a period from February 1, 1930 until the 31st of January, 1935, at a rental of $40.00 per month. The record further discloses that the premises in question were subject to an encumbrance secured by a trust deed executed by Mrs. Bauer in her lifetime;

that through a foreclosure proceeding this property passed to the Northwestern Trust & Savings Bank and that the defendant and her husband being made parties to that proceeding continued to occupy the premises and thereafter paid rent to the bank; that the bank afterwards sold the property to Wladislaus Goslinowski, and on the 15th of August, 1922, Goslinowski leased the premises to the defendant Pauline Sielski for a period beginning on the date of the lease and expiring on the 14th of August, 1923, at a rental of $90.00 per month. The evidence further shows that after the execution of this lease she paid the rent of $90.00 per month to Goslinowski until sometime in the spring of 1923, when Goslinowski sold the property to plaintiffs and assigned the lease to them; that Goslinowski introduced the plaintiffs to the defendant as the new landlord, and thereafter the defendant paid the rent to the plaintiffs. The lease by its terms expired August 14, 1923, and the instant case was begun on the next day, August 15, 1923.

The defendant contends that judgment is wrong and should be reversed because Joseph Sielski, the defendant's husband, was the party occupying the premises in question and he was not made a party to the action. We think this point cannot be maintained, because the lease in question is executed only by Pauline Sielski and the evidence is that she paid the rent under the lease.

It is next contended that the lease is void because it was never signed by the lessor. This point is also without merit, for it is the law that it is not necessary that a lease be signed by both landlord and tenant, the tenant's

signature is sufficient where he occupies the premises under the lease. Evans v. Schwartz, 211 Ill. App. 573. It is also contended that there was no legal notice to terminate the tenancy given. The lease expires by its terms August 14, 1923, and therefore, no notice was required.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

12 - 28787

M. LOUISE CRAIG, for use of James Nelson,

Defendant in Error,

v.

CHICAGO TRUST COMPANY, a corporation, (Garnishee),

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 11, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This cause involves the same matters as those considered and decided in M. Louise Craig for use of James Nelson v. Chicago Trust Company, General Number 28786, in which latter case we have this day handed down our opinion; and as the two causes were consolidated, one being upon an appeal, and the other upon a writ of error, the decision in General Number 28786 is decisive of this case.

REVERSED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

364 - 28323

EMMA M. ARNOLD,
Appellee,

v.

FREDERICK W. COX, et al,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

237 I.A. 622

Opinion filed Feb. 11, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 11, 1921, the complainant, Emma M. Arnold, filed a bill to foreclose a trust deed dated October 20, 1906, which was given to Edwin H. Arnold, trustee, to secure two notes given by the defendants Frederick W. and Frances A. Cox, one for $100.00 and one for $450.00. The first note became due October 20, 1907, and the second a year later. The defaults charged were non-payment of taxes, assessments, insurance, interest and scant security. The defendants above mentioned filed an answer denying that anything was due, and claiming that, instead, the complainant was indebted to them. They, also, set up in their answer that the actual complainant was Edwin H. Arnold. Lucile A. Cox, a defendant, filed an answer, claiming that she owned the property described in the trust deed, and that the notes had been paid, and that Edwin H. Arnold was the real complainant. The defendants, E. R. and Helen Burgess filed a joint answer, setting up that they have an agreement for a warranty deed for the premises; that they are informed that the whole

debt supposedly on the premises has been paid, and that the premises are worth $8,000.00. Edwin H. Arnold, trustee, did not answer and his default was taken. Replications were filed and then the cause was referred to a Master. Hearings were had before him, and a large volume of testimony taken, and many exhibits were introduced in evidence, including many items of account covering certain receipts and expenses running over a period of about 19 years.

On March 10, 1923, the Master's report was filed. He found, (1) that the court had jurisdiction; (2) that the defendants, Frederick W. and Frances A. Cox, being indebted to the complainant gave the notes in question and the trust deed to secure them; (3) that lot 24 and one foot of lot 23 were released therefrom; (5) that the complainant at the time of filing the bill was the owner of the notes; (6) that default was made as to the interest due on April 20, 1913; (7) (8) (9) (10) that E. H. Arnold as agent for the complainant paid certain taxes and assessments and an amount for redemption, and for certain insurance premiums; (11) (12) that E. H. Arnold, trustee, herein and husband of complainant is an attorney at law and had been, for a number of years prior to the execution of said securities, attorney for said Frederick W. Cox; that as attorney he had received from said Cox an assignment of rents of the premises known as 8844 South Morgan street; "and also had received from said Cox an assignment of the rents on the premises 8753 Carpenter street;" that Arnold under the assignment collected rents and paid out moneys for repairs on the premises; that during the years for which he was collecting the rents and paying the expenses the moneys paid out by him exceeded the amount received; that there was

not sufficient money received from the income of said properties to pay the interest on the notes and trust deed being foreclosed and to pay the taxes and insurance above referred to; (13) that defendants contend that said Edwin H. Arnold is the owner of the notes and trust deed sought to be foreclosed, but themaster finds that the complainant is the owner, and that in any event the amounts of said notes and the interest thereon from October 20, 1912, and taxes and insurance previously stated, have not been paid by any of the defendants and are valid and subsisting liens against the above described premises.

He further found as follows:- (14) "That the defendants, Frederick W. Cox and Frances A. Cox, his wife, have had a number of foreclosures brought against them and a number of deficiency judgments have been rendered against them, and have had some other litigation; that prior to the foreclosure being started herein the said defendant, E. H. Arnold, trustee, gave a statement of the amounts received and disbursed by him for Mr. and Mrs. Frederick W. Cox, and a disagreement arose concerning such statement. Considerable evidence has been taken in this case as to a transaction in which the Chicago, Rock Island & Pacific Railroad purchased Lot 24 and the south one foot of Lot 23 in Block 14 from said Frederick W. Cox. The purchase was made during February or March, 1908, and at that time there was an indebtedness on Lots 21,22, 23 and 24 in Block 14 for $500 evidenced by the note of said Frederick W. and Frances A. Cox, dated May 20, 1902, due three years after date, for the sum of $500 with interest at 6 per cent

evidenced by interest notes. In order to secure title to lots 24 and the south one foot of lot 23 for the railroad company it was necessary to procure a release from the trustee Henry F. Eidman, who refused to consent to this and the said Arnold was employed by the Rock Island Road to purchase property to widen the street, wanted to take up the mortgage which was then in the hands of Arthur C. Luedar, a real estate man. He did take up the note and trust deed and at his request the trustee released the property conveyed by said trust deed so that it might be sold to the Rock Island without any incumbrance thereon. That the money for the purchase price paid by the Rock Island Railroad was $600 which was deposited in escrow with the Real Estate Title & Trust Company and was to be paid out upon its issuing its guarantee policy to the purchaser which took title in the name of Mr. Gable, showing no incumbrance on the property. The defendants contend that $312.50 of this money was used by Mr. Arnold to reduce the $500. incumbrance and pay interest thereon and that Mr. Cox has never been credited in any statement given by Mr. Arnold for this amount. The evidence is not clear whether this money was used to help pay the $500 so-called Eidmann trust deed but the master has permitted the defendants to offer all evidence in their possession showing the transaction between themselves and Mr. Arnold, and after considering all the evidence, it appears that the aforesaid parties are largely indebted to Mr. Arnold outside the notes sought to be foreclosed on herein, and are not entitled to have same credited on the notes sought to be foreclosed. The theory of the defendants also is that Mr. Arnold is the owner of the notes sought to be foreclosed which the master finds is not so, but even if it were so, the master finds that

the indebtedness would still exist as stated in the bill of complaint, and that the defendants have not paid the notes, taxes and other items which he has found to be due herein."

The master stated the account showing the principal indebtedness as $550.00; interest thereon as $341.00; tax items, and interest thereon as $674.84; insurance and interest thereon as $95.93, and solicitors' fees as $450.00, making a total due of $2111.77, outside of master's fees and court costs, and recommended a decree of foreclosure for that amount. The defendants filed objections to the Master's report. They were overruled, and ordered by the Chancellor to stand as exceptions. On April 5, 1933, a decree of sale was entered for the amount found due by the Master, with interest to date, being the total sum of $2121.05. This appeal is from that decree.

The defendants filed seven objections - which were later ordered to stand as exceptions - to the Master's report.

It was claimed that Emma H. Arnold was not the owner of the principal note; that it had been paid, and that no amount thereon was due. The Master found that the complainant was the owner. The complainant and her husband both testified categorically that she was the owner of the notes in question. On cross-examination he was asked many questions concerning her ownership and his answers only emphasize his former statement that she was the owner. He testified that the notes were given chiefly for money of his wife, the complainant, which he loaned to Frederick W. Cox; that his wife had inherited between $3,000.00 and $4,000.00 from her father's estate; that he attended to her affairs; that the complainant was the owner

from the time the trust deed was recorded October 23, 1906. Further, it is admitted by Frederick W. and Frances A. Cox, defendants, in their answers, that "being indebted to complainant in the principal sum of $550.00" they "made their two principal notes * * * that thereupon said makers delivered said notes to complainant."

In view of the uncontradicted testimony and the admission in the pleadings, we are bound to conclude that the Master and Chancellor were justified in finding that the complainant was the owner.

It was claimed that the notes were paid and no amount was due thereon; that the court erred in finding that any sum whatsoever was paid by the complainant for taxes or special assessments or fire insurance, interest and principal owed. That is a very vague objection. The accounts rendered by E. H. Arnold cover nearly twenty-five pages of the abstract, involving hundreds of items, running over a period of about twenty years. In Moffatt v. Hanes, 154 Ill. 649, the court said, "The exceptions are the pleadings to the items of an account and must be specific, and not general, so they can be reviewed by the Appellate Court or Supreme Court." Naska v. Klainson, 43 Ill. App. 611. In Hayes v. Hammond, 182 Ill. 135, the court said:

> "The rule is the same as stated by the Supreme Court of the United States in Foster v. Goddard, 1 Black, 506, as follows: All that is necessary is that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and of law arising upon the report of the master on that subject."

To say that it was error to find that any sum whatsoever was paid for taxes or special assessments, or fire insurance, or interest, when those items cover pages of a long account, is not pointing out "distinctly" as the law requires, especially when from the record it appears that many, if not all, of the items were properly made and charged. Of course, in reality, a personal accounting between Edwin H. Arnold, who is a party only as trustee, and Frederick W. Cox is not here, primarily, involved. Mg defendant filed a cross-bill. The bill here is one merely to foreclose a trust deed given to secure the two notes, the execution and delivery of which are admitted. As the evidence shows in elaborate detail all the items of charge and discharge made by the complainant, the objections made should have pointed out distinctly the disputed items.

It is urged for the defendant that the notes were owned by Arnold, but that he had the suit begun in his wife's name, so that he might avoid a personal accounting between himself and the defendants, which accounting would show that the notes werepaid in full. The evidence shows that before the notes were given, Arnold had been the attorney for Cox, and that for many years, thereafter, he acted as his agent concerning the property involved. It, also, shows, according to Arnold's testimony, that he claims to have acted as the agent of his wife, the complainant, in regard to the notes in question, and, as her agent, to have made payments for her in settlement of taxes, assessments, insurance, and other charges, in order to preserve theproperty which had been conveyed to him in the trust deed. He held, therefore, a fourfold position, agent for his wife, agent for Cox; that about his own personal

relations with Cox; and, besides, that arising from being trustee of the real estate sought to be foreclosed. He was a party to the litigation, however, only as trustee in the trust deed; and the only issue, here, is what amount, if anything, was due the complainant on the notes and under the trust deed, and not what was the account between him as agent of Cox, and not what was his own personal account with Cox.

Arnold testified to certain amounts which he said he paid as agent of his wife. The Master recites them in detail in his account of what was due her in addition to the principal notes and interest. There was offered in evidence for the complainant certain tax receipts and certificates, and receipts for insurance showing the amounts allowed by the Master. On cross-examination, Arnold testified that he had charge of his wife's affairs and paid out his own money or her money as her agent, that such money was advanced as from the fund that belonged to her. It will be seen, therefore, that the evidence of the complainant and her husband, taken by itself, justifies the conclusion that the charges made by the master and sanctioned by the decree as to what was due the complainant were correct.

But, it is urged for thedefendant that the written account which Arnold furnished the defendant Cox and which was offered in evidence by the defendants, disproves the claim that the amounts allowed by the Master were actually made and paid by Arnold for his wife out of her funds, or by him out of his own funds for her benefit.

There is undoubtedly some conflict between the account which he gave Cox, and the evidence that all the items were paid out of her funds or out of moneys which he paid acting for her as her agent. His account is based, apparently, on the theory that he received the rents from the premises from year to year and had certain other transactions, which furnished a credit for Cox, and that he, Arnold, used that credit, and in addition, money of his own, and in the end, became, personally, a large creditor of Cox; and in stating that account, he credits himself personally with all of the items which he and the complainant in their testimony claim were paid either out of her funds or by money which he himself advanced as her agent. In one view of it, that account may be considered inconsistent with his testimony, still, however, as far as the complainant is concerned, being of the opinion, as we have stated, that the proof shows that she owned the notes, what the outstanding personal account may have been between Edwin H. Arnold and Cox, is here immaterial; that would be material only in a suit between him and Cox.

The complainant having shown by the direct testimony of her husband and other evidence, that the amounts allowed by the Master and confirmed by the decree were paid out for her by her husband as her agent, we do not feel justified in holding, notwithstanding the statement of account furnished by him to Cox, that the decree was erroneous.

For either of the two reasons, therefore: first, that the objections before the Master and the exceptions before the Chancellor were insufficient; and second, as the complainant

proved that she was the owner of the two notes, and sufficiently proved that there had been paid out on her behalf the amounts allowed by the Master, we do not feel justified in holding the decree to be erroneous.

It is contended that error was made in regard to the admissibility of certain evidence. We do not find, however, any of sufficient importance, to justify a reversal of the decree. It is also contended that the amounts allowed, both for the Master's and Solicitor's fees, are too large. Considering the work which the record shows was done, We think them both to be reasonable.

Finding no error in the record, the decree will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

363 - 29030

IDA VORMAN,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

237 I.A. 622

Opinion filed Feb. 11, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Ida Vorman, having been injured by falling upon a city sidewalk, brought suit against the defendant, City of Chicago, and obtained a verdict and judgment in the sum of $5,000.00. This appeal is therefrom.

It is the theory of the plaintiff that the evidence showed that she was injured by reason of the defective condition and the slipperiness of the sidewalk, in combination. It is the theory of the defendant that the plaintiff relied upon and proved mere slipperiness, which does not of itself make out a cause of action.

The declaration consisted of three counts. The first count alleges that on December 27, 1916, the defendant had control of Waveland avenue, and east and west street, between Rokeby street and Wilton avenue, and ought to have kept it in good and safe repair and condition, but wrongfully and negligently permitted it to be and remain in bad and unsafe repair and condition, and wrongfully and negli-

Opinion filed Feb. 12, 1969.

gently permitted and suffered snow and ice to accumulate thereon for more than a week preceding December 27, 1918, thereby making the sidewalk at that time unsafe and dangerous; and that it knew or by ordinary care could have known of the unsafe and dangerous condition of the sidewalk at that time. It, further, alleges that as she was then passing along the sidewalk, and in the exercise of ordinary care, and by reason of the unsafe, dangerous and slippery condition of the sidewalk at the time, she was thrown down and fell on the sidewalk and injured.

The second count, in addition to the charge as to the sidewalk being allowed to remain in bad and unsafe repair and negligently permitting snow and ice to accumulate thereon and thus making it unsafe and dangerous, alleges that it was the duty of the defendant to remove the snow and ice, but that it failed to do its duty, and in consequence the plaintiff while passing over the sidewalk, in the exercise of ordinary care, and by reason of the unsafe, dangerous and slippery condition, slipped and was thrown down and injured.

The third count, alleges that the defendant negligently permitted the sidewalk to be and remain in bad and unsafe repair and condition, and to be and remain uneven and permitted holes and depressions therein, and permitted snow and ice to accumulate thereon, making the sidewalk unsafe and dangerous, and that it was the duty of the defendant to keep the sidewalk free from holes and depressions so that no snow and ice could accumulate therein, and it was the duty of the defendant to remove the snow and ice, but it failed to do so. It then

alleges that the plaintiff, while exercising ordinary care, and while passing along the sidewalk, by reason of the unsafe, dangerous and slippery condition of the sidewalk, slipped upon said sidewalk and was thrown down and fell upon the sidewalk and was injured.

On December 27, 1916, a little after six o'clock in the evening, and after dark, the plaintiff, a married woman about 27 years of age, was walking with her small boy, three years of age, east on the south sidewalk on Waveland avenue, near Wilton avenue, when she fell and was seriously injured. She became unconscious, and when she came to, was taken home. About three weeks afterwards, she went to a hospital, where an operation on the coccyx was performed.

The important question in the case is whether the evidence sufficiently shows that the fall was caused by reason of the defendant's negligence in failing to keep the sidewalk in proper condition for foot passengers. The plaintiff says that the concrete sidewalk was broken in several places and that there were holes in it from four to six inches deep and that on the day in question it was covered with snow and ice. She says, further, that she slipped on the sidewalk where the ice was, slipped down right into the hole. Her evidence is somewhat confusing when she undertakes to be specific. She says she did not slip in the hole, but fell down right where the hole was; that the whole sidewalk was full of holes from four to six inches deep; that she did not step into the hole, but fell because of the hole; that there was ice all along the sidewalk and in the holes; that it had rained and snowed and

had melted and froze again; that the sidewalk slanted down, ahead, and there was a hole at the foot of the slant. The evidence of a Mrs. Anderson, who lived near, is to the effect that the sidewalk was full of holes five or six inches deep; that such had been its condition for about five years; that when it rained there was water there so that passersby had to walk on the lawn; that she was not on the sidewalk on the day in question and did not know if there was an accumulation of ice and snow there then. The evidence of one Mrs. McGovern, who lived near, is to the effect that the sidewalk was broken and had holes in it, four or five inches deep, and that it had been in that condition three years, at least. The evidence of her daughter is that she used the sidewalk every day and that in places it was from four to six inches down, and had more than one hole in it, and had been in that condition for several years; that prior to the accident it had snowed and rained and the sidewalk had not been cleaned; that it was frozen again, and was real slippery and filled with ice and snow; that the sidewalk sloped toward the lawn and was partly filled with ice and snow. On cross-examination she said that several of the squares in the sidewalk were sloped down and had been filled with snow and ice; that it had been slushy the day before but at the time in question was frozen up.

The weather report showed that there was a maximum fall of snow, between December 1 and 25 of seven inches; that the maximum temperature on the 25th was 32°, the minimum 19°, and the average 26°; that on the 26th, the three temperatures were, respectively, 45°, 29°, and 37°, and that on the 27th,

44°, 19° and 32°.

The evidence of one O. C. Duffin is to the effect that he walked over the sidewalk two to three times a week; that it sloped down in the center where the sections are; that in the summer, after a rain, he would get his feet wet; that it was sticking up a little at the sections and if you were not careful, you would catch your toe; that in his opinion the depression was about three inches; that there were two of those depressions where the flags came together; that where the sag was, there was always snow and ice in December; that Waveland avenue runs east and west , and that where the two flags from north to south meet there was a slight depression.

The defendant put in no evidence as to the condition of the sidewalk, save that of a clerk, one Lindlad, an employee of the City and formerly a sidewalk inspector, who testified as to what he found the condition of the sidewalk to be in March, about three months after the accident. He says there were then two depressions in the walk, one where the walk or flag was down about half an inch, and, another, about 12 feet east, which was down about an inch; that the flags were six feet wide. His evidence is not quite clear, but suggests that one of the stones was down about an inch below the other, and so, the one that was depressed slanted slightly. He , further, contradicted all the witnesses for the plaintiff as to the sidewalk being broken, testifying that there were no holes and no breaks in it.

It is claimed for the defendant that the declaration did not state a cause of action, and that as its motion

in arrest of judgment was overruled, the trial court erred. This contention is based on the theory that the declaration set forth as the cause of action only slipperiness of the sidewalk, and did not charge a structurally defective condition. The declaration, however, does allege in the first count that the defendant "wrongfully and negligently suffered and permitted the same to be and remain in bad and unsafe repair and condition, and wrongfully and negligently permitted and suffered snow and ice to accumulate thereon and remain thereon for a long space of time * * * thereby making said sidewalk at the time aforesaid unsafe and dangerous," and in the third count, amplifies the charge, and alleges that the defendant negligently permitted the sidewalk to be and remain uneven, and "negligently permitted holes and depressions to be therein and wrongfully and negligently permitted and suffered snow and ice to accumulate thereon;" and that it was "the duty of said defendant to keep said sidewalk in good condition and free from holes and depressions, so that no snow, water and ice could accumulate in such holes or depressions," but that "it failed and neglected to keep said sidewalk even and free from holes and depressions and to remove * * * said snow and ice." It is then, further, alleged that "by reason of the unsafe, dangerous and slippery condition of said sidewalk * * * she then and there slipped upon said sidewalk" and was thrown done and injured.

Obviously, the statement of the cause of action contains a charge that the sidewalk was in bad physical condition, containing holes and depressions that were a source of danger, and a charge that snow and ice were permitted to

accumulate thereon. And those charges are conjunctive. They are alleged in combination as the proximate cause of her fall. Slipperiness is not alleged as the sole physical condition which precipitated her fall, but as a description of one of the elements;in other words, as a condition existing in conjunction with others, all of which when taken together, make out a charge of negligence. We think, therefore, that the declaration was good and that the motion in arrest of judgment was properly overruled.

It is contended that the evidence did not sufficiently prove that the holes and depressions and the ice and snow caused her fall, but that it only shows that she fell on account of the slipperiness of the surface, and that it does not show that the snow and ice that were present constituted an obstruction to travel. The plaintiff says there were holes in the sidewalk that were from four to six inches deep; Anna Anderson, that it was full of holes, five or six inches deep; that there were holes four or five inches deep; Marie Duffin, that the sidewalk in places was from four to six inches down in some places. All of those witnesses lived in the neighborhood and knew the locality well. Oscar Duffin did not testify that there were any holes, but that the sidewalk was sunk down where the sections are, that the depression was about three inches, and that there were two such depressions. Lindblad, who examined the sidewalk in the following March, stated that there was one flag down an inch and one a half inch; and that there were no holes or breaks in the sidewalk.

Considering the testimony of the three witnesses who testified that there were holes in the sidewalk from 4 to 6 inches deep, and that of Marie Duffin that it was from four to six inches down in some places, it may well be that the jury believed that testimony and not that of Lindblad, and if they did, then, starting with that as a premise, it may well follow that believing that there was also snow and ice on the broken sidewalk, the defendant was liable for the unsafe and dangerous condition, the snow and ice being merely an added element, though not, taken by itself, the complete proximate cause. We are at quite a disadvantage in appraising the testimony, as we have but the printed record. The jury saw the witnesses and so could much better determine their credibility. We do not feel, therefore, that we are justified in overriding the verdict as manifestly against the weight of the evidence.

Objection is made to certain instructions. The one numbered 128 (so-called) is predicated on a defective walk. In the view we take of the evidence, that was proper. As we have stated, there was evidence that it was broken, full of holes, and so out of repair. We do not think the instruction erroneous, and the same may be said of instructions numbered 130 and 138. Instruction numbered 137 states the law quite appositely. The jury were entitled to be told that if a sidewalk is itself in a defective condition having holes or depressions therein, in which snow or ice accumulate, and such defective condition proximately contributes to cause the accident complained of, then such defective condition, together with the accumulation of snow or ice may constitute

the proximate cause" for falling. Counsel objected to a change which the trial judge made in instruction numbered 156 and given as 158. The change made was necessary. In view of the evidence it was defective without the modification. As to the charge that the instructions contained too much repetition on the same subject, we do not feel justified in reversing the case on that ground.

The contention that the plaintiff did not prove notice given to the defendant is untenable. The admission by the attorney for the defendant that the notice which was presented at the trial was served on the defendant, was sufficient, even though it was not subsequently physically made part of, or read into the record. Admissions of matters of fact between counsel in the trial of cases are to be encouraged.

Therein some criticism of the spelling of the name of one of the jurors. One of the jurors called to try the case is named J. K. Neale. Among the names of the jurors who signed the verdict, according to the Clerk's record, is J. K. Neak, Foreman; and in the Bill of Exceptions, in the written verdict, therein the name J. K. Neahr, Foreman. The initials and the first three letters of each are the same. There is no justifiable doubt but that all three designated the same person.

Finding no substantial error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. CONCURS;
THOMSON, J. DISSENTING:

I am unable to concur in the foregoing decision. The

plaintiff does not claim that uneven ridges or hillocks of snow or ice, amounting to an obstruction to travel, had been permitted to accumulate and remain at the point where she fell. She claims rather, that the defendant had negligently permitted the sidewalk "to be and remain in bad and unsafe repair and condition, and had negligently permitted and suffered snow and ice to accumulate thereon," thereby making the sidewalk unsafe.

While the plaintiff, in her testimony, refers to "holes" in the sidewalk "four to six inches deep" and one to two of the other witnesses make similar references to the condition of the sidewalk, it is entirely clear, in my opinion, when all the evidence in the record with reference to the alleged defects in the sidewalk is read, that there were no "holes" as we ordinarily understand that term. The only structural defect in the sidewalk at the place where the plaintiff fell, was that two of the concrete flags had settled at the point where they came together, apparently to the extent of about three inches, according to the most reliable evidence submitted in behalf of the plaintiff, and less than that, according to the defendant's testimony. This resulted in two slanting surfaces across these concrete flags, where water accumulated when it rained. At the time the plaintiff received her injuries, these slanding surfaces were icy and slippery, and all that the evidence shows, in my opinion, is that she slipped on one of those surfaces. In describing her experience on the occasion in question, she testified that she "slipped and fell", and at anotherpoint she said, "I slipped right on the sidewalk, right where the ice was;"

and on re-direct examination she testified, "My feet went right out from under me." In describing the condition of the sidewalk, she testified, "It was slanting. There was a hole there and full of ice." She was then asked where the hole was and she said, "At the foot of the slant." One of her witnesses, in describing the sidewalk at the point where the plaintiff fell, said, "It was just in a wave and when it would rain it would fill up with water." Another witness said, "The sidewalk in places was from four to six inches down." Another witness testified, "Several of these squares had been sloped down and had been filled up with snow." Another testified, "The sidewalk had sunken down in the center where the sections were made * * * I should judge about three inches * * * where the flags came together * * * and where this sag was there was always snow or ice." All these witnesses testified in behalf of the plaintiff.

In my opinion, a cause of action may arise where it is shown that a sidewalk was in a defective condition (such as might be the basis of a cause of action if it caused an injury without any slippery condition being present) and was covered with snow and ice, though not in such quantities as to cause an obstruction to travel, and the proximate cause of the injuries complained of, was the combined defective condition of the sidewalk and the slipperiness caused by the presence of snow and ice. But a cause of action is not proven, where the evidence shows that the sidewalk was not in such a defective condition as could be made the basis of a cause of action without any slippery condition being present,

and snow and ice were present so as to cause slipperiness, but not in such quantities as to cause an obstruction to travel, and the injuries were caused by the combined physical condition of the sidewalk and the slipperiness caused by the ice and snow. Where a sidewalk is not so defective that it may reasonably be said that the city will be considered guilty of negligence if the sidewalk is allowed to remain in such condition, the situation is not changed if a condition of mere slipperiness is added, due to a collection of water or snow which has been forzen. It would be utterly impracticable for a city to be required, at its peril, to remedy every depression however slight it might be, provided it was sufficient to hold water, which, when frozen would present a surface of ice, which is necessarily slippery.

It has been held a number of times that merely a slanting sidewalk or a depression, not dangerous in and of itself, when made slippery by ice, does not constitute such a condition as will make the City liable in damages where one slips and falls. Village of Gibson v. Johnson, 4 Ill. App. 288, where there was an inclination of twenty-three and one-half inches in fourteen feet of sidewalk, which became very slippery and uneven by reason of a fall of snow; Macomb v. Smithers, 6 Ill. App. 472, where there was a nine and one-half inch rise in the sidewalk in four feet, which had become very slippery from the melting of snow and from boys sliding upon it; and Metzger v. City of Chicago, 103 Ill. App. 605, where one of the flag-stones of which the sidewalk was composed was broken longitudinally in the center, forming a slight depression extending east and west along the walk, and where the court said, "A mere break in a stone pavement which

does not endanger its use under ordinary conditions, does not necessarily require repair, and the failure to so repair it does not of itself and necessarily constitute negligence." In the latter case, the slanting surfaces had become slippery by reason of the ice, but the court pointed out that it was not a case "where snow or ice had accumulated in ridges or uneven shapes such as would necessarily render passage along the walk dangerous."

The conditions involved in the case at bar were apparently precisely those presented in the last case cited. The sidewalk on which the plaintiff in the case at bar fell, ran east and west. The witness who gave the clearest description of the situation testified that at the point where the plaintiff fell, "these two flags ran from north to south from one edge of the sidewalk to the other * * * and there was a depression as they met each other," which, this witness stated, was about three inches in extent.

In my opinion, the case of Dragass v. City of Chicago, 193 Ill. App. 75, cited by the plaintiff, is not in point. There, there was a depression in the sidewalk where it passed under a railroad viaduct, and the plaintiff charged that the defendant City permitted large quantities of snow and ice to accumulate in and around that depression, making it dangerous for persons using the sidewalk, and that she was thereby caused to fall, receiving the injuries complained of. The court pointed out that many witnesses testified that the sidewalk was sunken and that water would accumulate in the sunken places "making humps of ice some four or five inches high." One witness described the place

as "full of holes and bumps, eight to twelve inches in height." No such condition is complained of here.

I am further of the opinion that the court erred in the giving of instructions. Instructions referred to in the briefs and in the foregoing majority opinion as 128, 130 and 138, (these bring the numbers of the pages of the record on which the instructions respectively appear) all referred only to the question of the sidewalk being out of repair and for that reason dangerous. The last instruction referred to, directs a verdict, if the jury believe from the evidence that the defendant failed to use reasonable care in keeping the sidewalk in proper repair. The plaintiff does not base her case, as it is set forth in her declaration, in any count thereof, on the contention alone that the sidewalk was out of repair. Instruction 138 directs a verdict on a theory which, the plaintiff has not declared upon. In all counts there is an allegation of a defective condition of the sidewalk plus snow and ice, and the plaintiff contends that the injuries were caused by a combination of the alleged defective condition and the alleged slipperiness occasioned by the snow and ice. In my opinion, Instructions 128 and 130, were not warranted by the evidence in the case. I am further of the opinion that the court erred in giving Instruction 137, where the jury were told that while a pedestrian is not entitled to recover for injuries caused only by slipping on snow or ice upon a public sidewalk, yet, if the sidewalk is itself in a defective condition, having holes or depressions therein, in which snow or ice accumulate, and such defective condition proximately contributes to cause the injuries, then such defective condition together with the

snow and ice may constitute the proximate cause of the injuries. The instruction, in my opinion, is confusing and misleading in several ways. It is useless to instruct a jury to the effect that some given thing may constitute the proximate cause of injuries unless it may be said that if such be the case, a right of action will arise in the person injured. For the reasons already given, I am of the opinion that a right of action does not arise under the circumstances outlined in this instruction, unless one of two conditions is present,- either that the accumulation of ice and snow was such as to amount to an obstruction to travel or that the alleged defective condition of the sidewalk was such as could be made the basis of a cause of action, where one was injured, because of such condition, without the presence of any ice or snow.

390 - 39048

MARY QUIGLEY,

Appellee,

v.

W. N. MACQUEEN & COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

237 I.A. 622

Opinion filed Feb. 11, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Mary Quigley, who had in the latter part of 1916, bought for $1,000.00 two first mortgages of $500.00 each from the defendant, W. N. MacQueen & Company, on June 10,1917, made a contract of exchange through, as she claims, Winfield N. Macqueen, President of the defendant company, for ten shares of common stock in that company. She claims that at the time of making the exchange he told her they were giving bonds and that she would get one per cent more than on her mortgages, that she asked him if she was taking any risk and whether she could have her money back at any time the same as on the mortgages, and that he said, "Absolutely no risk, Macqueen & Company's reputation stands back of those bonds;" that all she had to do was to give the company thirty days' notice and she would get her money back, less 1 per cent; that in the early part of 1919 she first knew she had stock.

She further claims that she saw him in the spring of 1919, and told him she was giving him 30 days' notice;

that he asked for 60 days' notice and that she should come back or telephone him; that she telephoned him, and he said, to wait a little longer, "Just have a little patience and call me up again, or come to see me in a month;" that she telephoned five or six times but did not get him; that on one occasion she did reach him, and said, "What about my money, you know you have been stringing me a long time now, and I need my money;" that he said, "You must have a little patience, you know the war has put us back in our business."

It is admitted that she received dividends at the rate of 3½ per cent each in the sum of $35.00 on July 10, 1917, January 10 and July 10, 1920. Also, that on October 21, 1922, she made a written demand on the defendant for $1,000.00, less one per cent, and tendered back the certificate of stock. There was a trial before the court, without a jury, and a finding and judgment for the plaintiff in the sum of $1,010.47. This appeal is therefrom.

It is contended that the defendant company did not sell the stock in question to the plaintiff, nor contract for its repurchase, and that, in any event, the plaintiff's cause of action is barred by the statute of limitations. The claim made by the plaintiff was made out <u>prima facie</u>, in our judgment, by her testimony and that of her sister-in-law, Mrs. Costello. But, it was denied <u>in toto</u> by the testimony of Macqueen. His testimony, in effect, is that he first saw the plaintiff in June, 1917, at her store; that a few days before she had telephoned him and asked his advice in regard to exchanging some bonds she had gotten from the defendant for some oil stock, as she wanted to get a

larger rate of interest; that he told her that he had some stock of his own that was paying seven per cent; that he would be glad to exchange ten shares of his stock in the defendant Company for her two bonds; that she said she would make the exchange; that he went out the next day to her store and made the exchange; that he said nothing about the defendant repurchasing the stock; that the next time he saw her was in January 1930; that she wanted to know if the stock was worth anything and that he told her it could be sold for$650.00; that he told her to be patient and it would go up; that he said nothing, nor did she, about notice; that the first intimation he had of the plaintiff's claim was when he received a written notice of October 21, 1932.

It will be seen, therefore, that the claim of the plaintiff is categorically denied by the testimony of Macqueen, and, although, that might not be sufficient to prevent recovery, the testimony of Mrs. Costello, the plaintiff's sister-in-law, is quite strong corroboration of the plaintiff, and is in direct contradiction of much of Macqueen's testimony on material matters. Mrs. Costello's evidence is to the effect that she was present in the plaintiff's store in June 1917, when Macqueen called; that he said, "I am Mr. Macqueen of Macqueen & Company, and I have something very good today to offer, and I want to let you in today on the ground floor of something good;" that he would give her something that would pay seven instead of six per cent; that the plaintiff said, "There is one question I must find out before I makeany investment, that is if I can get the money back whenever I need it;" that he said, "That is all very well, Mrs. Quigley, the Compa

is behind these. Any time you notify the company you want your money, you can get it within thirty days, deducting a small amount like one per cent. The Company will buy back your bonds;" that at a subsequent time, she places it in 1919, she and the plaintiff saw Macqueen at a trial in the County Building; that the plaintiff told him she had spoken to a lawyer in the case, and had shown him her papers, and the lawyer had said they were not worth anything; that Macqueen told her the Company was all right, and to be patient and give him about 60 days; that the company could offer her then $650.00; that she told him she would not take it; that he told her, then, if she would wait sixty days or so he was sure she would get all her money from the company; that the plaintiff told him she was then giving him notice that she wanted her money from the company; that she could not get along without it; that she said the notice was thirty days; that he said, "Make it sixty."

Taking the testimony of Mrs. Costello in conjunction with that of the plaintiff, which was given to support her claim, it is quite obvious that it would not be reasonable for us to hold either that Macqueen did not represent the company, or that it was not proven that it was agreed, when the contract of exchange was made, the plaintiff was given the right to have back her money upon giving thirty days' notice. Macqueen was the President of the defendant company. The plaintiff's evidence and that of Mrs. Costello is that the contract was made with him as representing the company, and there is no evidence that he had no right or power to sell the company's stock for the company. Whether it was or not

his personal stock is immaterial. In Corzena v. Western R. & L. Co., 112 Ill. App. 309, the court held that a stranger dealing with the president and manager of a company and having confidence in his apparent power, with no notice of lack of authority, may hold the corporation liable. In Home Savings & State Bank v. Wheeler, 74 Ill. App. 261, the court said, "Third parties who deal in good faith with a corporation must be protected in a reliance upon what its officers do and omit to do." As to the contention that there was no consideration for the promise to take back the stock, as stated in Lincoid v. Overshiner, 171 Ill. App. 37, "the promise to purchase this stock by defendant was part of the original undertaking," so here, one of the elements of the original contract was the promise of Macqueen. It was not necessary that that promise should have a separate consideration to support it. The contract as made was mutually binding, and within its confines and as part of it was the promise made by Macqueen that the defendant would take back or buy back the stock on thirty days' notice.

It is contended that as the contract was made on June 10, 1917, and the suit was brought on October 26, 1922, more than five years having intervened, the statute of limitations is a bar. That was pleaded affirmatively by the defendant in its affidavit of merits. The formal written demand is dated October 1, 1922.

The trial judge found, as a matter of fact, that the cause of action did not accrue to the plaintiff until sometime in the year 1919, or thereafter, and, as a matter of law, that the statute of limitations had not run. At what time did the plaintiff's cause of action arise? The promise that the

plaintiff might have her money back at any time upon thirty days notice, was made on June 10, 1917, and that promise was, as we have said, one of the elements of the contract of that date. It was a binding obligation on that date, subject only to the condition that the defendant was not bound to fulfill it at any time unless first given thirty days notice. Under the contract the title to the ten shares of stock passed on June 10, 1917 to the plaintiff; subject, however, to the right to rescind and return the stock. Meacham on Sales, Sec. 676. It was in reality a sale subject to be defeated by a condition subsequent. Until notice was given the title remained in the plaintiff. In Campbell v. Whorlsky, 170 Mass. 63, the court said:

> "Where a demand must be made before bringing an action, it is plain that in a strict sense the cause of action does not accrue until after the demand. Whether the creditor's rights may be lost by delay in making a demand when no time is fixed for it, is a question which is answered differently in different jurisdictions. It has sometimes been held, or seemingly assumed, that, even if many years are permitted to elapse without a demand, the statute will not begin to run until the demand is made. Holmes v. Kerrison, 2 Taunt. 323. Thorpe v. Booth, R. & M. 388. Thorpe v. Coombe, 8 Dowl. & Ry. 247. Stanton v. Stanton, 37 Vt.411. Rhind v. Hyndman, 54 Md. 527. Girard Bank v. Bank of Penn Township, 39 Penn. St. 22. See Thrall v. Mead, 40 Vt.540. Under this doctrine, carried to its extreme limit, a liability to a suit upon a claim might continue for an indefinitely long time. The extreme doctrine in the other direction is, that the 'cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable.' Palmer v. Palmer, 36 Mich. 487, 494. Ware v. Hervey, 57 Maine, 391. Sanford v. Lancaster, 61 Maine, 434; Pittsburg v. Connellsville Railroad v. Byers, 32 Penn. St. 22. Morrison v. Mullin, 34 Penn. St. 12; Rhines v. Evans, 66 Penn. St. 192, 195."

In Roush v. The Illinois Oil Co., 180 Ill. App. 346, where a situation existed involving similar questions

to those arising in the instant case, the court held that as the notice was not given within the period fixed by the statute of limitations, it was not given within a reasonable time; and, also, held that the cause of action was barred by the statute. The court there cites, with approval, the Campbell case (supra).

There is no doubt but that the evidence for the plaintiff shows that in 1919 she gave Macqueen thirty days notice, and that he, by his conduct, led her to believe that he then recognized her right to rescind, and merely asked that some more time be given. Upon those facts, it is our judgment that it is reasonable to hold that the plaintiff's right of action then for the first time accrued. And, further, in our judgment, the notice that was given in 1919 was given within a reasonable time. In the Campbell case (supra) the court said: "Where thereis nothing to indicate an expectation that a demand is to be made quickly, or that there is to be delay in making it, we are of the opinion that the time limited for bringing such an action after the cause of action accrues should ordinarily be treated as the time within which a demand must be made." Citing Jameson v. Jameson, 73 Mo. 640.

Being of the opinion, therefore, that the notice was given within a reasonable time and that the right of action did not accrue until the notice was given in 1919, it follows that the statute of limitations is not a bar.

It is contended that as the defendant had pleaded that the contract was not made with it, nor with any one

authorized to act for it, the trial court erred in rejecting certain testimony of Macqueen which was offered to show that no part of the proceeds of the bonds ever became the property of the defendant. That evidence was competent, but as Macqueen, himself, testified that the stock which he gave the plaintiff was his own stock, we do not think the error sufficiently substantial to justify a reversal.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

402 - 29060

R. L. FORDYCE, et al, copartners, doing business as Great Lakes Coal & Coke Company,

Appellants,

v.

CHICAGO COAL AND MINING COMPANY, a corporation,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 622

Opinion filed Feb. 11, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 1, 1922, the plaintiff, Great Lakes Coal & Coke Company, sent a written order to the defendant, Chicago Coal and Mining Company, requesting a shipment to it, the plaintiff, at Chicago, of 18 cars of West Kentucky, mine run, coal at $2.40 F.O.B. "mines". On the same day, the defendant sent a written acceptance of that order to the plaintiff. On the same day the plaintiff paid the defendant in full for the 18 cars, but was only given bills of lading for 14, and the other four were never delivered. On July 19, 1922, after some correspondence and oral communications, the defendant sent a check for $456.00, being the equivalent of what the plaintiff had paid for the four cars that the defendant had failed to deliver to the plaintiff. On July 21, 1922, the plaintiff wrote the defendant that it could not accept the check in settlement as the defendant had agreed, from day to day, to replace the cars; and notifying the defendant that unless it furnished the four cars by July 22, 1922, it, the plaintiff, would make such a purchase in the open market and charge the de-

Opinion filed Feb. 11, 1960.

fendant with the difference. On July 27, 1922, the plaintiff wrote the defendant that it, the plaintiff, had purchased four cars, on the market, at $10.00 a ton, and enclosed a debit memorandum of $1,613.10, and, further, therein stated that unless that amount was paid in ten days, it would start suit. On August 7, 1922, the defendant wrote back, stating that it returned the debit memorandum, and that the plaintiff was not authorized to make the purchase and charge the same to the defendant, and that the defendant's records showed that all their transactions had been settled.

On August 1, 1922, the plaintiff brought suit in the Municipal Court.

The statement of claim sets up the contract to purchase the 18 cars; the delivery of 14; the failure to deliver four cars; the payment in full of the purchase price; notice to the defendant that unless the 4 cars were delivered on or before July 22, 1922, the plaintiff would purchase the amount in the open market and charge the defendant with the extra cost; the refusal of the defendant to comply; the purchase of 4 cars in the open market at an excess cost to it of $1,613.10, and that the defendant owes the plaintiff that amount and $456.00, or a total of $2,069.10.

The defendant's final affidavit of merits sets up that it has a good defense to the whole of the plaintiff's claim; that prior to July, 1922, the plaintiff had ordered certain cars of coal and paid the sum of $456.00; that before the delivery of the cars they were diverted by the shipper; that on July 19, 1922, it refunded to the plaintiff, by check, the sum of $456.00; that there was endorsed upon

the back of the check that it was sent to the plaintiff in refund on I. C. cars; and that the check was accepted in settlement and in full payment of the obligation and in full settlement of all damages arising out of the transaction.

There was a trial, without a jury, and a judgment in favor of the defendant. This appeal is therefrom.

The sole issue precipitated by the pleadings was whether the check was accepted in settlement. In order to appreciate the situation at the time the check was sent and received, and, so understand the legal relationship of the parties, it is necessary to have in mind the general history of the transaction which preceded the giving of the check.

The written contract for the purchase and sale of the 14 cars of coal had its inception in a telephone conversation between one Boyd, representing the defendant, and Fordyce, representing the plaintiff. Boyd called up Fordyce and told him that he had 18 cars of West Kentucky, mine run coal that he would like to sell at a price. Fordyce told him that his experience with him in the past had been such "that we did not know whether if we made this purchase, that they would deliver the coal, because they had failed to do so in the past on other orders we had given them, and I had no reason to believe that they would treat us any different on these 18 cars." Fordyce then asked what the price was, and Boyde told him, and said, "I can't sell them to you unless you pay us cash, because I cannot get the cars without the money to take up the bill of lading." Fordyce testified that Boyd said, "If you will give

us a check for these 18 cars, I will send my man down to your office and turn the check over to him," that Fordyce then said to him, "I'll tell you what I will do, I will turn the check over to you, when you turn over the bill of lading to us." Fordyce further testified that Boyd sent his man to the plaintiff's office, and the plaintiff sent its man with its check to go with Boyd's man to the bank and check up the bills of lading, so that the cars could be delivered to the plaintiff, but that "When our man came back he had 14 bills of lading and they had our money, and we were shy 4 bills of lading;" that that conversation occurred on the day the coal was purchased, May 1, 1922. On May 25, 1922, the defendant wrote to the plaintiff, stating that it, the defendant had been tracing the 4 Illinois Central cars, giving the numbers, which had not been delivered, and asking them if three of them, which the defendant had been informed had been unloaded, had been unloaded by the plaintiff. The defendant further stated in that letter, "We are anxious to replace immediately any of these cars that did not reach your customers, but up to date, we do not know what has transpired." On June 5, 1922, the defendant wrote to the plaintiff a somewhat similar letter to that of May 25, and asked for a reply to the letter of May 25. On June 5, 1922, the plaintiff wrote the defendant, referring to the 4 cars, and said, "On May 25 we told you to replace these cars, and to date we have received no notice of replacement, and we must insist that shipments be made immediately against this order." On the next day the plaintiff wrote the defendant, "Our first intimation

that these cars were not coming forward on the orders was when Mr. Odell called us up and told us so. These cars were reconsigned by us to the Corn Products Refining Company, and were never received by them, and they were insisting upon our replacing the coal. The cars were unloaded on the Chicago & Northwestern Railroad, but the Railroad Company refuses to tell us by whom. None of these cars reached our customer, and we must therefore insist that you ship us 4 cars immediately to replace them." Fordyce, one of the copartners of the plaintiff company, testified that after May 1, 1922, he had thematter up with Boyd many times; that he called him, and tried to call him once or twice every week from then on, and went to his office to see him; that in those conversations he told Boyd he wanted him to replace those 4 cars; that Boyd would promise to ship them on a certain date, then on that date when they had not arrived, would promise to ship them on another future date; that that was kept up until the end; that he, Fordyce, asked Boyd why he did not go out on the market and buy them; that the market was going up; that Boyd told him on each occasion if he would give him a little more time he would get 4 cars of Western Kentucky coal and complete his order. When the question was put to Fordyce if during any of that time he asked Boyd to return the amount that had been paid for the 4 cars of coal that had not been received, he answered, "I think I did, and I finally felt that there was absolutely no chance to have him keep his word;" that Boyd, the first time, asked him if he would give him a little more time; that that was the middle or latter part of June; that at that time Boyd said, "he was going to replace the cars,"

and asked Fordyce to wait a little longer; that finally he did return the amount of money that the plaintiff had paid for the 4 cars of coal which it did not get. Fordyce further testified that he occasionally talked with Odell; that he said to Odell, "Our experience in the past has been about like this, and I thought it was a dirty trick;" that one day Boyd said, "Now, if I can give you screenings in place of mine run, would you take it?" that the witness answered, "Boyd, we would be glad to take anything in the way of Western Kentucky coal;" that "he could give us lump, mine run, or screenings, or nut, or anything;" that that was practically a continuous performance" from the time the contract was made until about July 20. Fordyce testified, on cross-examination, that a strike in some of the mines began on April 1, 1922, and influenced the handling and price of coal because of the rise in the market.

Odell, a salesman for the defendant, testified that the cars in question were supposed to be shipped to Chicago; that he had a telephone conversation with Fordyce, in which the latter demanded his money back that was paid for the 4 cars of coal; that the plaintiff had demanded its money back right along; that the conversation with Fordyce was in the early part or the middle of June; that Fordyce called up quite frequently, and always asked for the coal; that he, the witness, told Fordyce they were doing the best they could to make the replacement, but that the conditions were unusual. Odell said further that he kept telling Fordyce right along that he was trying to replace the coal; that the first conversation he had on that subject was about the

first of June; that they did not refund the money until July 19, 1922; that it was not until about July 19, that the defendant was able to come to the conclusion that it could not replace the coal; that as soon as they found that out, they sent the check in question.

After failing to fulfill its contract, and having had the plaintiff's money for a long time, so that the contract was and had been throughout all that time executed and completed on the part of the plaintiff, the defendant- knowing as we presume it knew, that the price of coal had gone and was going up while it continued in default, and while the plaintiff was all the time out the money it had paid over for the coal it was entitled to have and which the defendant was bound to deliver and which the plaintiff had resold andhad to replace, and knowing that the plaintiff, in order to get what it had paid for, would have to go out on the market and buy four cars at a much higher price as the result of the defendant's default - sought at last to condone its default by sending to the plaintiff, not the then market price of four cars of coal, but the price of four cars of coal as that price existed months before when it was much lower; in other words, to cause the plaintiff, who had long ago executed to the full its contract and had suffered a long delay, a great loss; in other words again, the one in default sought to make the one who had done its full duty, suffer for the defaulting party's breach. Unless theres is some necessary form of the law in the way, or unless the evidence shows that the plaintiff has overtly foregone its rights, the law will not sanction such a claim.

Emphasis is placed by the defendant upon the fact that it sent its check, dated July 19, 1922, to the defendant for the contract price of the four cars, $456.00, and as the plaintiff cashed it, there was an end to their relations. But, the history of their relations, the plaintiff clamoring for the coal and the defendant making promises to deliver it, taken along with the immediate notice by the defendant that the "check cannot be accepted in settlement" all go to show that the allegations in theaffidavit of merits "that said check was accepted in settlement and in full payment" were not proven.

Evidently, the defendant tried to bring about an accord and satisfaction, but failed. Apparently, from the testimony of Fordyce, the plaintiff had had somewhat similar experiences with the defendant before, and, so, it is not surprising that when the plaintiff received the check, it kept it, but wrote the defendant that it could not be accepted in full payment. It would have been unreasonable for the plaintiff to have sent back the check when it was mutually known not only that that amount was due, but that the price of coal had gone up. The defendant was not misled. The plaintiff notified it almost at once, and both knew there was no accord and satisfaction. The evidencesnows neither a meeting of minds on the subject of settlement, nor facts justifying an estoppel. Here, at the time the check was sent, there was no dispute between the parties. The defendant never disputed its obligation to furnish the four cars, and there had not then arisen any controversy between them as to what the defendant owed, if anything; so, when the plaintiff received the check, the principle, that where there is a <u>bona fide</u>

dispute and one of the parties to that dispute accepts a proffered sum, but states he takes it under protest, he is bound, (Ostrander v. Scott, 161 Ill. 339; Hayes v. Mass. Life Ins. Co. 125 Ill. 626) does not here apply. Further, in no view of the issue brought about by the pleadings was the subject of rescission an issue. Hamill v. Watts, 180 Ill. App. 279.

On July 21, 1922, the plaintiff bought four cars of West Kentucky coal at the market price to replace the original four, and had to pay $1,613.10 more than it would have done under its contract. The judgment will be reversed, and judgment entered here in favor of the plaintiff for that sum.

REVERSED AND JUDGMENT HERE.

O'CONNOR, P.J. CONCURS;
THOMSON, J. SPECIALLY CONCURRING:

While I concur in the foregoing decision of this case, I am not able to agree with some of the reasons given therefor, in the majority opinion. If there is a dispute between the parties as to how much is due, a payment of the amount claimed by the debtor to be due, in full settlement, if accepted by the creditor, is a satisfaction of the claim, even though the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim. Snow v. Griesheimer, 220 Ill. 106.

The facts in thiscase are not sufficient to make out an accord and satisfaction, under the rule thus laid down,

for several reasons. There was no dispute between the parties. The amount which the plaintiff was demanding was the amount which the defendant remitted. The plaintiff was also demanding that the defendant furnish the coal, and the defendant was agreeing to do so, and not until after the remittance was sent the plaintiff did the defendant decline to do so. The defendant did not send its remittance as a payment in full of all demands in connection with the transaction. There was merely a notation on the back of the check, to the effect that it was a refund on the four cars which had not been delivered, which is quite a different thing.

The authority cited above also holds that where the amount due a creditor is ascertained and not in dispute, the payment by the debtor and acceptance by the creditor of a less sum will not operate as a satisfaction of the demand.

50 - 29132

CARL P. SORBY,

Defendant in Error,

v.

KRISTIAN BAUN, for use
DANSK TIDENDE, Garnishee,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

237 I.A. 623

Opinion filed Feb. 11, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Sorby, brought suit in the Municipal Court against the defendant Kristian Baun, and recovered a judgment in the sum of $300.00 and costs. An execution was duly issued on the judgment and returned "no property found." The defendant, Baun, filed a debtor's schedule. Therein he recited that all his personal property consisted of certain items which were set forth in detail. The last item was stated as follows: "Debts due and owing to Kristian Baun: Dansk Tidende (a corporation) $225.00."

An affidavit for a garnishee summons was filed by the plaintiff, Sorby. It recited that on June 29, 1923, the plaintiff recovered a judgment against the defendant, Baun, for $300.00 and costs; that an execution had been issued and returned "no property found"; that the affiant has just reason to believe and does believe that Dansk Tidende, a corporation, is indebted to the defendant and has effects and estate of the defendant in its possession, custody and charge.

A garnishee summons was issued on July 10, 1923, summoning Dansk Tidende, a corporation, to be and appear before the Municipal Court on July 20, 1923, to answer unto Baun for the use of the plaintiff, Sorby, as to the rights, credits, etc. in its hands belonging to Baun. That summons was returned as follows: "By order of plaintiff's attorney, I have served this writ on the within named, Dansk Tidende, a corporation, as garnishee, by delivering a copy thereof to C. W. Larsen, Agt. of said corporation, in the City of Chicago, this 13th day of July, 1923, and paid $1.10 fees and mileage 12:10 P.M. The President, Secretary, Superintendent, General Agent, or other officers of said corporation not found in the City of Chicago."

On July 20, 1923, an order was entered by the court that the time of the garnishee to answer be extended ten days. A further order was entered on August 1, 1923. It recited that the cause coming on for further proceedings, it is ordered by the court that judgment be entered against the garnishee, Dansk Tidende, for failure to comply with the order of July 20, 1923, and that the defendant have and recover of and from the garnishee, the sum of $300.00 and costs, and that the total of said moneys be had and recovered from said defendant for the use and benefit of the plaintiff, and that execution issue against the garnishee, for the full amount owing from the garnishee to the defendant. From that judgment, the garnishee prosecutes this writ of error.

It is claimed for the garnishee: (1) that the alleged service by delivering a copy of the garnishment writ

by delivering a copy to C. W. Larsen, agent of the corporation, does not conform strictly with the requirements of the statute; (2) that, as the defendant, Baum, scheduled in his debtor's schedule the alleged debt of the garnishee, Dansk Tidende, as one of his assets for which he sought exemption, it was error to enter judgment against the garnishee; that, if the schedule were good, it would result in the garnishee being ultimately, held liable twice for the same debt; and (3) that before a final judgment could be entered against the garnishee, a scire facias should first issue.

(1) The statute concerning service, Chapter 110, Sec. 8, provides as follows:

> "An Incorporated Company may be served with process by leaving a copy thereof with its President, if he can be found in the County in which the suit is brought. If he shall not be found in the County, then by leaving a copy of the process with any Clerk, Secretary, Superintendent, General Agent, Cashier, principal, Director, Engineer, Conductor, Station Agent or any Agent of said Company found in the County."

The recital in the return, "by delivering a copy thereof to C. W. Larsen, agent of said corporation," the President, Secetary, Superintendent, General Agent, or other officers of said corporation not being found in the City of Chicago, is sufficient. It is urged, apparently, that the statute provides an order in which representatives of a corporation shall be considered in making a service in the absence of the President. We do not find any such provision. If the President is not found in the County, then service may be accomplished by leaving a copy of the process with any one of those enumerated in the statute. Here the copy of the process was delivered to

by delivering a copy to C. E. Larson, agent of the corporation, does not conform strictly with the requirements of the statutes; (B) that, as the defendant, Kane, contended in his motion to vacate the alleged debt of the garnishee, Mark Thomas, as one of his assets for which he sought exemption, it was error to enter judgment against the garnishee; and, if the exemption was good, it could result in the garnishee being ultimately, held liable into the same court; and (C) that before a final judgment could be entered against the garnishee, a point facing should first issue.

(1) The statute concerning service, Chapter 110, Sec. 8, provides as follows:

> "An Incorporated Company may be served with process by leaving a copy thereof with its President, if he can be found in the County in which the suit is brought. If he shall not be found in the County, then by leaving a copy of the process with any Clerk, Secretary, Superintendent, General Agent, Cashier, Principal, Director, Engineer, Conductor, Station Agent or Key Clerk of said Company found in the County."

The neutral in the return, "by delivering a copy thereof to C. E. Larson, agent of said corporation," the President, Secretary, Superintendent, General Agent, or other officers of said corporation not being found in the City of Chicago, - sufficient. It is urged, apparently, that the statute provides an order in which representatives of a corporation shall be considered in making a service in the absence of the President. We do not find any such provision. If the President is not found in the County, then service may be accomplished by leaving a copy of the process with any one of those enumerated

Larsen, agent of the corporation. The statute permits service upon "any agent of said company found in the County." This contention is, therefore, untenable. Crowley, Cook & Co. v. Sumner, 97 Ill. App. 301.

(2) It is true that the defendant in his debtor's schedule, after describing certain items of domestic furniture, recited, as part of his personal property, the following: "Debt, due and owing to Kristian Baun: Dansk Tidende (a corporation) $225.00." Whether that was a debt for wages or what its source, we do not know and so we are not entitled to conclude that it was an item exempt from garnishment. Chap. 52, Sec's. 13 and 14, Cahill's Rev. Stat. 1923.

(3) The record showed that there was an affidavit for a garnishee summons; the issuance of a garnishee summons on July 10, 1923, summoning the garnishee to appear and answer on July 20, 1923; service of the summons on the garnishee on July 12, 1923; an order on July 20, 1923 that the time of the garnishee to answer be extended ten days; and an order entered on August 1, 1923 that judgment be entered against the garnishee for failure to comply with the order of July 20, 1923.

Chap. 62, Sec. 8 Cahill's Rev. Stat. 1923, provides: that when any person shall have been summoned as a garnishee "and shall fail to appear or make discovery, as by this Act required, the court * * * may enter a conditional judgment against such garnishee for the amount of the plaintiff's

[illegible], agent of the corporation. The trial judge permitted service upon "any agent of said company found in the County." This construction is, therefore, untenable. [illegible] v. [illegible], 87 Ill. App. 601.

(3)-It is true that the defendant in his behalf's schedule, after enumerating certain items of domestic furniture, recites, as part of his personal property, the following: "Debt, due and owing to Kristian Hamm: Dansk Tidende (a corporation) $250.00." Whether that was a debt for wages or not, for aught, we do not know and so we are not entitled to conclude that it was an item exempt from garnishment. Chap. 52, Sec's. 18 and 14, Smith's Rev. Stat. 1922.

(4) The record showed that there was an affidavit for a garnishee summons; the issuance of a garnishee summons on July 10, 1922, summoning the garnishee to appear and answer on July 20, 1922; service of the summons on the garnishee on July 12, 1922; an order on July 20, 1922 that the time of the garnishee to answer be extended ten days; and an order entered on August 1, 1922 that judgment be entered against the garnishee for failure to comply with the order of July 20, 1922.

Chap. 62, Sec. 8 Smith's Rev. Stat. 1922, provides: that when any person shall have been summoned as a garnishee "and shall fail to appear or make discovery, as by this act required, the court " " " may enter a conditional judgment against such garnishee for the amount of the plaintiff's

demand * * *, and thereupon a scire facias shall issue against such garnishee, returnable * * * at the next term of court * * * commanding such garnishee to show cause why such judgment should not be made final. If such garnishee, being served with the process or notified, as required by law, shall fail to appear or make discovery in the manner aforesaid, the court * * * shall confirm such judgment, to the amount of the judgment against the original defendant, and award execution for the same and costs. If the garnishee shall appear and answer, the same proceedings may be had as in other cases."

The record here shows that no conditional judgment was entered against the garnishee. This is a statutory proceeding, and as the record discloses that the statute was not complied with, the action of the trial judge in entering final judgment was erroneous. It is urged in support of the judgment that it should be presumed that there was an appearance and request on the return day of the summons for time to answer, and that if there was an appearance and time was given, it was not necessary that a conditional judgment should be entered and that a scire facias should issue against the garnishee before entering the final judgment. With that we cannot agree. There is nothing in the record which justifies any such presumption. Carter v. Lockwood, 74 Ill. App. 15; Motor Car Securities Corporation v. Shockley, Gen. No. 28666.

The judgment, therefore, will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

72 - 29159

GEORGE W. SWIGART, et al, etc.,
Appellants,

vs.

S. KLEIN,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

237 I.A. 623

Opinion filed Feb. 11, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from an order sustaining a general demurrer to the plaintiff's declaration.

The declaration alleged the following:- That on October 25, 1923, the defendant, S. Klein, entered into a written contract with one Richard M. Johnson, doing business as Richard M. Johnson Co. of Chicago to the effect that S. Klein, the owner of the premises known as 6712 and 6722 Sheridan Road, employed R. M. Johnson Co. as his exclusive agent, to manage and care for those premises for a certain specified compensation; and that the management consist of the collection of rents, employment of labor, and purchasing supplies and material necessary for the proper maintenance and care of the building and premises; ordering and supervising ordinary repairs and decorating, paying for the labor, supplies, material, repairs and decorating and other expenses and charges, institute and prosecute suits for rent and possession, when advisable, and all at the owner's expense, and in addition thereto,

advertise rental space, at the owner's expense.

It further alleged that the contract provided that the period of employment should be from December 1, 1922, to November 30, 1923, and to continue thereafter, until the expiration of thirty days' prior written notice of the intention to terminate the agreement, given by the agent to the owner, or by the owner to the agent, subject, however, to the terms and conditions with reference to the compensation to be paid said agent in the event of the termination of the agreement.

It further alleged that the contract provided that the owner should pay the agent for its services a sum of money equal to four per cent (4%) of the gross amount of rents which accrued during the time of the continuance of the agreement, or an extension of it; that at the expiration of the contract, the owner should, by way of full compensation to the agent and in discharge of all commissions due or to become due, pay forthwith, in addition to the four per cent (4%) of all rents which had accrued, a commission to the agent equal to three per cent (3%) of the rentals payable during the unexpired portions of all leases on the premises in existence at the time of such termination.

It further alleged that the contract provided that it could be cancelled at any time by the owner by his giving fifteen (15) days' notice to the agent, and by payment of three per cent (3%) on the unexpired portion of all leases in effect at the time of cancellation.

It further alleged that the agent under took to manage the building, and that the defendant agreed and promised to pay him a sum of money equal to four per centum (4%) of the gross rentals received from the tenants of the building.

It further alleged that on January 2, 1923, the original agent, Johnson, in writing, for valuable consideration, assigned his right, title and interest to the contract of October 25, 1922, to the plaintiffs, and that the owner, the defendant, gave his written consent to such assignment; that the plaintiffs "thereupon entered upon the duties required to be performed by them under the terms of said contract, and so continued until the 17th day of July, 1923;" that it was provided by the terms of said contract that the contract could be cancelled at any time by giving fifteen (15) days' notice to the plaintiffs, and by payment to the plaintiffs of three per centum (3%) of the gross rentals on the unexpired portion of all leases in effect at the time of such cancellation; that on, to-wit, the 2nd day of July, 1923, the defendant, by letter addressed to the plaintiffs, elected to cancel the said contract with the plaintiffs.

It further alleged that at the time of cancellation of the contract, the defendant was indebted to the plaintiffs for rentals of June, 1923 in the sum of $10.80; on July, 1923, the sum of $45.20, and for "three per centum (3%) of the gross rentals on the unexpired period of all the leases in force and effect at the time of such cancellation in the sum of Eight Hundred Twenty-two and 60/100 Dollars ($822.60)."

It further alleges that the legal owner had no
knowledge of anything, nor have the authorities imposed any
penalties on her, nor is a lien of money owed to flow-ne-
ne (Ill) of the prime weekly rental fees for records at
the business.

In further claims that on January 8, 1971, the
mayoral (pro) Johnson, in writing, for ultimate distribu-
ution, assumed the duty, state and responsibility to the problem
of Clarence Ed, Inc., in the plaintiff, and that the owner,
the plaintiff, gave the written notice to such assignment
that the plaintiff (Clarence Johnson) upon the terms con-
cerning it be performed by flow-neter (Ill) notice of this com-
ment, rel.ne mentioned well, on 17th day of June, 1970;
that it was provided by the terms of said contract that the
contract would be cancelled at any time by giving fifteen
(15) days' notice to the plaintiff, and by payment to the
plaintiff of three per months (3%) of the gross receipts
on the mortgaged portion of all leases in effect at the
time of such cancellation; and, finally, the 2nd day of
July, 1970, the defendant, by letter addressed to the plaintiff,
elected to cancel the said contract with the plaintiff.

It further alleges that at the time of execution
of the contract, the defendant was indebted to the plaintiff
in the sum of some, 1970 in the sum of $10.00; on
July, 1970, the sum of $20.00, and for fifteen per centum
(15%) of the gross receipts on the mortgaged portion of all the

It further alleged that it was provided by the terms of the contract that the plaintiffs might receive and retain rents collected in payment of moneys due and unpaid to them for services and commissions under the terms of the contract, and that in pursuance thereof, the plaintiffs collected from the tenants for rentals for the month of July, 1923, Four Hundred Eighty-five and no/100 Dollars ($485.00), which amount has been applied by the plaintiffs on the indebtedness of the defendant; that as a result thereof, the defendant was liable to pay the plaintiffs the sum of Three Hundred Ninety-three and 60/100 Dollars (393.60), which the plaintiffs have requested, and which the defendant has refused to pay.

It is difficult to understand the criticism of the declaration made by counsel for the defendant. The function of a declaration is to state a cause of action. That does not mean, of course, that it must recite in detail all the facts that the pleader expects to prove. The declaration recites the written contract, making Richard M. Johnson, doing business as Richard M. Johnson Co., the exclusive agent for the management and care of the premises in question. That is a bilateral contract made up of mutual promises, and resulting in certain mutual obligations. It sets up that that contract was duly assigned, with the written consent of the owner, to the plaintiffs, and that the plaintiffs "thereupon entered upon the duties required to be performed by them under the terms of said contract, and so continued until the 17th day of July, 1923."

It shows that the owner put an end to the contract, as he was entitled to do, by giving fifteen days' notice to the plaintiffs. That being done, it follows, as an inference, that the plaintiffs were entitled to whatever amount, if any, the accounts would show, on the introduction of evidence, was due to them.

Counsel for the defendant argues that the "mere assignment of a contract does not impose on assignee liabilities imposed on the assignor, unless it further appears that assignee accepted the same." We do not know quite what that means. The declaration, however, shows that not only was the contract properly assigned and assented to by the owner, but that the plaintiffs "thereupon entered upon the duties required to be performed by them." That statement is sufficient to inform the defendant that the plaintiffs claimed not only that there was an assignment, but that there was an acceptance of it and work done under it, pursuant to the contract. The declaration even goes so far as to allege that the plaintiffs performed their duties under the contract, as assigned, from January 2, 1923, to July 17, 1923, and that the defendant acted under the terms of the contract by giving 15 days notice of its termination on July 25 to these plaintiffs.

In our judgment, the declaration stated a cause of action, and the demurrer should have been overruled. The judgment, therefore, will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

—

[illegible] It should then [illegible] not be and in the [illegible]
or by the [illegible] It is, it [illegible] "[illegible]" [illegible]
the [illegible]. This being done, it follows, as a [illegible],
that the [illegible] [illegible] [illegible]. If [illegible]
the [illegible] [illegible] [illegible] [illegible] of evidence, [illegible]
[illegible] be [illegible].

Should [illegible] the defendant argues that the "[illegible]
[illegible] of a contract does not impose an [illegible] [illegible]
imposed on the [illegible], unless it further appears that [illegible]
[illegible] the same." We do not know quite what that means.
[illegible] [illegible], however, shows that not only was the con-
[illegible] [illegible] and [illegible] to by the [illegible], but
that the plaintiffs "[illegible] [illegible] upon [illegible] [illegible]
[illegible] to be performed by them." That it [illegible] [illegible] [illegible]
to inform the defendant that the plaintiffs claimed not only
that there was an [illegible], but that there was an [illegible]-
[illegible] of it and [illegible] [illegible] it, [illegible] to the [illegible].
The defendants [illegible] [illegible] so far as to allege that the plain-
tiffs performed their duties under the [illegible], or [illegible],
from January 8, 1938, to July 17, 1938, and that the defendant
[illegible] under the terms of the [illegible] by giving its [illegible] notice
of its termination on July 22 to [illegible] [illegible].

In our judgment, the defendants [illegible] a [illegible] of
[illegible], and the demurrer should have been [illegible]. The
[illegible] therefore, will be reversed and the [illegible] remanded.

REVERSED AND REMANDED.

5 - 28702

L. SAMUELS AND I. EDELSON,

Defendants in Error,

v.

A. C. RITZLER, ROY KEISTER and JOSEPH F. BURK,

Plaintiffs in Error.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 623

Opinion filed Feb. 11, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendants, who were partners doing business under the name and style of Triangle Advertising Service, seek to reverse a judgment for $105.25, recovered against them in the Municipal Court of Chicago by the two plaintiffs, who were doing business as partners under the name and style of Printing Service Company.

The plaintiffs' claim was made up of three items, (1) 500 Cards - $9.35; (2) 15000 folders - $93.00; and (3) a charge for making a change in the copy on the cards - $3.00. The defendants admitted they owed the first item amounting to $9.25, but they denied that any such changes were made, as called for by the third item; and as to the second item they contended that the folders delivered were not in accordance with the contract between the parties; were so poorly done as to be useless, and that by reason of this fact they had been obliged to have them prepared elsewhere. They also contend in this connection that they endeavored to secure the plates for these folders from the plaintiffs, so that they might be print-

ed elsewhere and that the plaintiffs refused to deliver them, which necessitated the procuring of new plates, at a cost of $33.50; that in supplying these new folders they were required to expend personal time and labor of the reasonable value of $50.00; that the folders they supplied to take the place of the ones furnished by the plaintiffs, cost the defendants $150.00; that the plaintiffs had agreed to furnish certain other folders free of charge, and that the ones furnished were short as to count and so poor as to quality that the defendants were obliged to procure them elsewhere at a cost of $55.00; and that by reason of the plaintiffs' failure to carry out their agreement, the defendants had lost certain profits in their business. The defendants filed an affidavit of merits and also an affidavit setting forth a claim for set-off, made up of the various items referred to, which aggregated $413.50. The issues were submitted to the trial court without a jury, resulting in a finding for the plaintiffs and a judgment in their favor for $105.25, the full amount of the plaintiffs' claim. To reverse that judgment the defendants have sued out this writ of error.

As already stated, the defendants admitted the item of $9.25. We are unable to find any evidence in the record supporting the plaintiffs' third item amounting to $3.00. As to the second item, the written contract between the parties called for 15000 "Jewelry folders" in red and green, at a price of $75.00. On this item the contract provided "It is fully understood that this price includes change in copy on three thousand (3,000) of the above mentioned folders. Additional folders same as above will be furnished at a price of ten

($10.00) dollars per thousand, which includes change in name and address on both sides."

The contract provided that the plates for these folders were to remain the property of the defendants but were to remain in the plaintiffs' possession until January 2, 1923. The contract was dated October 20, 1922. One of the plaintiffs testified that the 3000 folders, which they had agreed to furnish free of charge, were delivered to the defendants during the first week in November and that about the middle of that month the plaintiffs delivered the 15,000 jewelry folders, to the Zeitz Jewelry Company, the defendants having a contract with that Company to furnish these folders. This witness further testified that after these deliveries, a bill covering the items here sued for was sent to the defendants, and the witness thereafter called on the defendants and requested payment, which they declined on the ground that "the job was not exactly what they ordered and the colors were bad." This witness testified to a later conversation, in which the defendants represented that their customer would not accept the folders on the ground that they were not correct as to color. Further testimony was given by this witness to the effect that samples of each of the two folders were submitted to the defendants in the form of proof, and O.K'd by them. Neither of these O.K.'d proofs were offered in evidence, nor was any evidence offered to the effect that the folders, as printed, corresponded with the colors on the proof. On cross-examination this witness was asked if the folders in question were printed in red and green, as called for by the contract,

and he said he was not sure. Apparently several of these folders were exhibited to him, which were poorly done, and he explained that all printing jobs contain some poor copies, which would run as high as one per cent of the job, and that to cover this they usually overran enough to take care of poor prints. His attention was called to the fact that this contract called for 15,000 folders to be done for $75.00, and he was asked how he accounted for the fact that the plaintiffs were suing on this item for $93.00, and he replied that according to the contract the plaintiffs were not required to make changes in the copy, but that the defendants had made such changes and at the time had been told that the changes would involve an extra charge, and they said, "All right. Charge us that last extra." He further said that charge amounted to $18.00. It is difficult to account for this charge without at least some further explanation, as the contract provides that the price of $75.00 is to include change in copy on 3,000 folders.

One of the defendants testified that there was considerable delay by the plaintiffs in getting out the 15,000 jewelry folders; that they finally learned that the folders were at the bindery for folding and the witness and one of his employees went to the bindery to see them, and they found them so poor that they immediately notified the plaintiffs that they werenot done in red and green, as specified in the contract, and that they could not accept them, and the plaintiffs replied that they were done in red and green and that it was a good printing job. A number of these folders were introduced in evidence and are in the record, and the testimony is that they are a fair sample of the lot which was printed by the plaintiffs

in fulfillment of this contract. In our opinion, the defendants were fully justified in rejecting the folders, for they are not done in red and green, but all of the part that is supposed to be green, is very dark drab with a slight tinge of olive green. These folders contained the words, on the cover page, "Jewelry for Christmas" and on the inside they contained a list of suggested gifts of jewelry. They were apparently intended for use in connection with the Holiday trade and were to be done up in the Holiday colors of red and green. We are of the opinion that the folders found in the record are wholly unsuitable for any such purpose. There is no evidence in the record contrary to that submitted in behalf of the defendants, to the effect that the folders introduced in evidence were a fair sample of the lot. The witness last referred to testified further that one of the plaintiffs finally said, referring to this lot of folders, "If they are not all right we will print them over. He said they did look kind of poor, that they may have got the ink wrong. He said, we will print them over for you if you demand it." This was substantiated by a letter addressed to the defendants by the plaintiffs, signed by the plaintiff Samels, the letter being dated November 23, 1922, in which the plaintiffs say, "We are still willing to reprint Zeitz Bros. order as part of our original agreement, so that you will be saved as much trouble as possible, but we are not willing to print proofs on different stocks of paper for nothing as you have asked us to. We are willing to keep our original agreement but no more." We are unable to determine from the evidence we find in the record what occasioned the failure of the plaintiffs to do this job over again. Another witness

testified that he was the one who accompanied the previous witness to the bindery to look over these folders, and he testified to the conversation had with the plaintiffs when objections were made to these folders and he said that the plaintiff, Samels, asked them to see their customer Zeitz and see whether he would not be willing to accept the folders. He further testified that they saw Zeitz and then returned to Samels and explained to him that there was a possibility that the job would be acceptable if it was printed on some other stock, on which "perhaps the ink would lay better or that it would give better register on the job." He further testified that Samels at first would not do anything but finally agreed to give them the stock suggested. It would seem from the quotation we have made from the plaintiffs' letter, that they ultimately declined to do the job on the stock which had been suggested. The defendants gave testimony to the effect that the paper stock on which the plaintiffs had printed these circulars was not first grade paper stock as called for by the contract.

On the evidence in the record we are of the opinion that the plaintiff was not entitled to recover on either of the two contested items incorporated in their statement of claim.

The defendants attempted to show that they had been damaged by the refusal of the plaintiff to deliver the plates used in printing these folders, so that the defendants might have them printed elsewhere, such damages amounting to the cost of procuring new plates. The court sustained objections to this proof, on the ground that the contract provided that the plates

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by the [illegible].

On the evidence in the record we are of the opinion
that the plaintiff was not entitled to recover on either of the
two counts [illegible] in their statement of claim.

The defendants attempted to show that they had been
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of [illegible] the plaintiff. The court [illegible] in this
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were to remain in the possession of the plaintiffs until January 2, 1925. In our opinion, this was error. The defendants should have been permitted to make such proof; the evidence in the record being to the effect that the defendants had a contract to furnish these folders to one of its customers; that this contract called for a delivery from the defendants to these customers by a given date; that the folders printed by the plaintiff were unsatisfactory and both the defendants and the customer were justified in rejecting them; and the plaintiffs unreasonably delayed or refused to reprint them on first class stock, as called for by their contract with the defendants. Under such circumstances the defendants were within their rights in attempting to secure folders elsewhere with which to filfill their contract, and it was the duty of the plaintiffs to minimize the damages as much as possible by enabling the defendants to use the plates. The clause referred to in the contract could not reasonably be given the effect of giving the plaintiffs the right to hold on to the plates under the circumstances shown in this record. The defendants introduced evidence tending to show that the usual and customary price for printing the 15,000 folders which were required by this customer was $140.00. Testimony was also submitted to the effect that the reasonable cost of providing the 3,000 folders which the plaintiffs agreed to supply free of charge, but which were also unsatisfactory, was $24.00.

For the reasons stated the judgment of the Municipal Court is reversed and judgment is entered here in favor of plaintiff in the sum of $9.25.

Plaintiffs to pay costs in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

353 - 29011

DENIS J. LEAHY,
Appellee,

v.

FINCH FRUITT COMPANY, Inc.,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Feb. 11, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $866.84, recovered by the plaintiff in the Municipal Court of Chicago. The plaintiff's action was based upon a claim for salary at the rate of $50 a week, from September 15, 1921 to December 31, 1921. The defendant Company was located in New York City and was engaged in the woolen business. A written contract was entered into between the parties, by the terms of which the defendant engaged the plaintiff as a salesman for the period from January 1, 1921, to December 31, 1921. By the terms of this contract the defendant agreed to advance to the plaintiff all legitimate traveling expenses, and office expenses in Chicago, and also a drawing account of $50 per week, payable semi-monthly. The contract specified the commissions which the plaintiff was to be paid on the sales he made. It then provided that the advances on the drawing account and expenses were to be deducted from the commissions, and any balance due either party at the end of the year was to be paid by that party to the other. The parties proceeded to operate under this contract.

Under date of April 2, 1931, the plaintiff wrote the defendant a letter, reading in part as follows: "After an experience of three months handling your line, I have been reluctantly forced to the conclusion that I can make no money under our present arrangement. Certainly not this year." Plaintiff went on in this letter to state what his expenses would be for the year; referred to the fact that his commissions would not average over seven per cent, and that in order to make anything over expenses, he would have to sell upwards of $90,000.00 worth of merchandise. He then said: "This will prove an impossibility this year. I see no chance of anything else than being in your debt at the end of the year for a sum about equal to my total drawing a/c - this would be very unsatisfactory to you and would be calamitous to me." He then went on to say that he wanted to represent the defendant, and felt that he could do the defendant justice, and stated that if the defendant felt that he was the man for the place, "let us get together and remove any and all difficulties so we can go along and work harmoniously for the best interests of both of us. I have been working very hard for you but have for the past month worried a great deal and feel now that there must be some relief for this unsatisfactory situation." Mr. Finch, president of the defendant company replied to this letter, from the plaintiff under date of April 4, telling him he thought he was unnecessarily alarmed; that he had not had time to size the situation up accurately; that by the time he had reached the end of his first year he would feel differently; that the prospects for fall business were assuring; and asking that the plaintiff go ahead for another six months, at the end of which time, he assured the plaintiff, he would not have "cold feet." The

plaintiff wrote Finch in reply to this letter under date of April 9, thanking him for his letter of the 4th but stating that it had settled nothing and "the fact as you can see is that I am disappointed and dissatisfied. The whole matter has got on my nerves and I am worrying myself sick." He then went on to say that his experience of the past three months had shown him that he had better take precautions or he might wind up the year in the defendant's debt; that he had unfortunately allowed himself to be deceived by statements that he could make $5,000.00 a year under this contract; that he had come to see the situation more clearly and while "I am willing to play the game I will however protect myself as I have a perfect right to do." He referred to Finch's expression of confidence in the future, and asked, "Why then do you not step into the breach and say our firm will release you from responsibility for the expense of conducting the Chicago office and are willing to guarantee to you $50 per week for the conscientious work you are doing for us." This, he wrote, would relieve him of all his worry, and he could then devote himself enthusiastically to the defendant's service. He then refers to certain economies he might adopt in the conduct of the Chicago office, and he said he would probably be compelled to adopt such measures to protect himself against loss. He closed this letter by saying, "What I want is the assurance that after having given you faithful service for twelve months I will not wind up in your debt."

Under date of April 11, Finch replied to the plaintiff's letter of the 9th telling him that in order to settle the matter that was worrying him, he (Finch) personally, would

pay whatever amount the defendant might find himself in debt to the defendant, at the end of the year. The plaintiff again wrote Finch, thanking him for his kindness and generosity, but he stated that he could not accept any such proposition from Finch personally. The plaintiff went on to say in this letter, that this was an affair between him and the defendant, and as the defendant would be the one to receive the benefit of his labors, he considered it up to the defendant to make the sort of an offer which had been made by Finch personally. He closed his letter by insisting that the corporation take whatever responsibility there was in the matter and leave Finch out of it, personally.

Under date of April 30, Finch again wrote the plaintiff saying that while the other half of the firm was not present at the time he was writing, he felt sure he would be glad to share with him (Finch) any loss they might sustain on the plaintiff during the first year. He again assured him that there was not going to be any loss, but if there was, the plaintiff would not have to pay it. Under date of April 22, the plaintiff replied to this letter, apparently wanting the assurances contained in Finch's letter of April 30, put more formally, and saying, "Kindly fix this matter up so there will be no hesitation or doubt in my mind and let us get together." In this letter he added, "If at any time you feel I am not bringing home the bacon for you or you feel I am falling down on the job all you have to do is say so and I will silently steal away.- I want nobody's money I don't earn - of course this should go both ways." Under date of April 25, the defendant corporation sent the plaintiff a letter, apparently in re

to the plaintiff's letter of April 22, which read as follows: "For the first year of your engagement with us, should your commissions not cover your drawing account, we will not hold you responsible for the difference. Trusting this will satisfy you in the matter, and that you will 'fire' in some fat orders, we are, Very truly yours."

The next correspondence which appears in the record consists of a letter from Finch, to the plaintiff, in which he quoted the last paragraph of the plaintiff's letter of April 22, in which the plaintiff had said, in substance, that if at any time the defendant felt he was not satisfactory, all the defendant had to do was say so and he would "steal away." After quoting that part of the plaintiff's letter of April 22, Finch went on to say in this letter of September 9, that he was very greatly disappointed with the plaintiff's showing; that at that time the plaintiff's overdraft amounted to about $300.00, "which I think is enough for us to lose." In this letter Finch went on to say that he had no idea where the trouble was but that other Chicago salesmen had secured business with lines similar to the defendant's. Finch closed this letter by expressing the hope that the plaintiff would appreciate his position and "after you 'steal away', be just as good a friend as you can be to me."

In reply to the last letter the attorneys for the plaintiff wrote the defendant, saying among other things, that the plaintiff always lived up to his contracts and did not propose to be imposed upon, and that under his contract with the defendant his salary was going on at the rate of $50.00 a week. In a later letter from the plaintiff's attor-

neys to the defendant, they stated that he had a valid and enforceable contract with the defendant, which didn't expire until December 31, and that he would continue to fulfill his part of the contract, as far as he could in view of the fact that the defendant had notified all the plaintiff's customers that he no longer represented the defendant. The attorneys further stated that the plaintiff would expect the defendant to carry out the contract on its part and pay the $50.00 a week due him under the contract.

The plaintiff testified that late in January 1921, the defendants cut their prices on various lines from twenty-five to fifty per cent to "bring them into harmony with the market" and that these cuts affected his commissions. He further testified that the general condition of the woolen market during the year covered by his contract, "was probably the worst in the history of the United States." It is the position of the plaintiff that by reason of this changed condition he had to face, he wrote the defendant in April and began the correspondence which resulted in what he claims was a modification in the terms of his contract, the modification being the giving of a guarantee by the defendant to the effect that the plaintiff's commissions would equal his drawing account and expenses, and if they did not the defendant would not hold the plaintiff responsible for the difference.

In support of its appeal the defendant contends that the plaintiff may not claim the advantages of the altered contract without showing that there was a valuable consideration moving from him, for the new undertaking of the defendant in the form of a guarantee, and that an examination of the

correspondence shows that as a consideration for this guarantee, by the defendant, the plaintiff had agreed that he might be discharged by the defendant whenever the latter felt that he was not "bringing home the bacon."

In our opinion, the correspondence is not capable of that construction. If it be taken that plaintiff's letter of April 22, was offering an agreement on his part that he might be discharged, if the defendant would agree to relieve him of his obligation to pay any balance that might be found to be in defendant's favor at the end of the year, that offer was being made with the further suggestion that defendant agree that plaintiff might resign at his pleasure. In other words, the plaintiff's offer was a two-way proposition involving his right to resign as well as defendant's right to discharge. Defendant's letter of April 25, was not an acceptance of that proposal, either in form or in substance. On the contrary, the defendant merely wrote the plaintiff, in effect, what Finch had personally undertaken to assure him, prior to the plaintiff's letter of April 22, and in its letter of April 25, defendant said unconditionally, "for the first year of your engagement with us, should your commissions not cover your drawing account, we will not hold you responsible for the difference." Defendant shows clearly, by the next sentence in its letter, that it does not consider it an acceptance of all plaintiff had suggested in his letter of April 22, for defendant adds, in closing its letter of April 25, "Trusting this will satisfy you in the matter." Apparently it did satisfy the plaintiff for the evidence shows the parties went along under the contract as thus modified for some months.

But the defendant contends that if its promise, as contained in its letter of April 25, did not have as a consideration for it the agreement on plaintiff's part that he might be discharged whenever the defendant was dissatisfied with his services, then it was without consideration and void, for then the only consideration for it was plaintiff's agreement to perform the services for the defendant which he was already under legal obligation to perform under the original contract.

That question might have arisen if the parties had continued under this contract until the expiration of the year which it covered, and some question had then presented itself involving some balance then claimed by the defendant from the plaintiff under the original contract, and if the plaintiff had then claimed the benefit of this agreement made by the defendant in its letter of April 25. But that is not the situation. Whatever the effect of the letter of April 25, may have had on plaintiff's obligation to pay the defendant any balance represented by the excess of his drawing and expense accounts over his commissions at the end of the year, it had no effect whatever on defendant's agreement to employ plaintiff for the full year and pay him $50 a week as a drawing account and also his expenses in the Chicago office, throughout that period. Plaintiff at no time suggested that he was not willing to continue representing the defendant. He did not resign nor threaten to. Under his original contract he was entitled to receive the amount of his drawing account until the end of the year, as well as the payment of

his expense items. We are not called upon to determine what the respective rights of the parties might have been at the end of the year, under the alleged altered contract, because that situation never arose, due to plaintiff's discharge in September. The defendant does not claim the right to discharge, under the original contract, and we have stated our reasons for holding that such right was in no way included in the subsequent arrangements of the parties.

We are not called upon to determine whether plaintiff's discharge was justified by the facts involved. As a matter of law, under the terms of the contract between the parties, no right of discharge existed. The plaintiff had the right to continue his services until the end of the contract period, and to receive the amount of his drawing account until then. Having been wrongfully discharged, as a matter of law, he is entitled to his damages.

The defendant makes no point referring to the plaintiff's measure of damages nor is any contention made that, if plaintiff is permitted to recover, the amount of his drawing account for the balance of the year is not the proper measure of damages, or that such amount should be reduced by the amount of plaintiff's earnings during that period or what he could have earned by the exercise of reasonable diligence, (Doherty v. Schipper & Block, 250 Ill. 128) nor is it contended that plaintiff failed to prove that he had earned nothing during the period referred to, although he was reasonably diligent in his efforts to do so.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

387 - 29045

MARSHALL O. DENSBY,
Appellee,

v.

FREDERICK H. BARTLETT,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

237 I.A. 623

Opinion filed Feb. 11, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Bartlett, seeks to reverse a judgment for $25,000, recovered against him by the plaintiff, Densby, in the Circuit Court of Cook County in an action brought by the latter to recover damages, alleged to have been suffered by him because of the negligent operation of an automobile, in which the plaintiff was riding and which he alleged was, at the time, being operated by the defendant.

The defendant Bartlett was a real estate operator in the City of Chicago. Through his real estate organization and agents he was engaged in selling lots in a subdivision located in the southern part of the city. He apparently carried on extensive real estate operations, and in connection with these operations, he found it desirable to provide automobiles for the transportation of prospective customers from their homes, or from his various offices, or from railroad depots adjacent to his various sub-divisions, to the properties in which these customers might be inter-

ested, or in which it was being sought to interest them, and back again. In this connection, the defendant Bartlett maintained a traffic department in his business, which had charge of the management of these automobiles. The cost of the hire of the automobiles was distributed among the various subdivisions as a part of the operating expenses charged against them under the head of "transportation." To supply the automobiles used in his traffic department in the manner above described, the defendant entered into an arrangement with one Saracino, who operated a garage and was in the business of letting out automobiles for hire. Saracino furnished everything in connection with the running of the automobiles, including chauffeurs. In some instances Bartlett hired these cars from Saracino by the hour and in others by the day. The car involved in the case at bar was one for which Bartlett was paying by the day.

The occurrence in question happened on Sunday, June 23, 1918. About a month previous to that date, the plaintiff had visited the subdivision already referred to, and arranged to purchase a lot there. Apparently, in the preparation of the papers, some error had been made and a lot had been designated which was not the one the plaintiff had picked out, and in the course of straightening the matter out, one of the defendant's agents suggested that the plaintiff visit the subdivision again and make another selection and this he did on the day in question. One way for the plaintiff to reach the subdivision was by means of the Illinois Central Railroad. For that purpose the defendant's agent furnished transportation over the

the railroad to the plaintiff and his wife and daughter. The tickets turned over to the plaintiff in this connection, contained certain return trip coupons and in order to procure the tickets entitling the plaintiff and his family to return on the railroad, it was necessary for him to present these coupons at the defendant's office out in the subdivision, and there exchange them forthe return trip tickets. The plaintiff and his family went out on the railroad and after visiting the subdivision and completing his arrangements for the purchase of his lot, the plaintiff and his family went to the office of the defendant, at the subdivision, for the purpose of exchanging his return coupons for railroad tickets back to the city. It seems that he was obliged to reach his home at a given hour and he explained to one of the defendant's agents that such was the case, by reason of the fact that he was obliged to be on duty that night, in the course of his employment. The agent then suggested that he would hardly be able to reach his home at the desired time if he returned by train, and he told the plaintiff that he would send him home in one of their cars. This agent testified, "We had lots of cars that day. * * * He came out in a train and he was a customer, and I thought it would be nice for him to ride home in a car and I told him I would send him back with one." The plaintiff accepted the suggestion. The agent summoned one of the cars, which was being used that day in connection with the operations of the defendant at this subdivision, taking the car from "our own parking stand around the office," and the plaintiff and his wife and daughter entered the car and started for home.

After going some distance up into the city, in driving around a corner, the driver of the car ran one side of it up over a safety island, throwing the plaintiff out into the street and inflicting the injuries which occasioned this law suit.

The plaintiff, originally, made both Bartlett and Saracino parties defendant and there were also other parties which have since been eliminated, and to which it is not necessary to refer; and it will likewise not be necessary to recite the history of the pleadings, which is extensive. The issues were submitted to a jury, resulting in a verdict in favor of the plaintiff and against the two defendants named, in the sum of $40,000. Plaintiff remitted $15,000, and motions for a new trial, made by each of the defendants were overruled. The defendant, Saracino, then moved for a judgment in his favor non obstante veredicto, which motion was allowed, and judgment was entered in his favor and against the plaintiff for costs. Judgment was then entered for the plaintiff and against the defendant, Bartlett, for $25.000. To reverse that judgment this appeal has been perfected.

The question involved on this appeal is: Whose servant was the driver of the automobile at the time the plaintiff was injured? In support of his appeal the defendant Bartlett contends that the driver of the automobile was not his servant, but was rather the servant of Saracino. Under all the evidence in the record we are of the opinion that the relationship of master and servant did exist between Bartlett and the driver of the automobile. There are a great many cases in which this question has been involved and expressions

are to be found in the course of these opinions, which, when taken out of the decisions and considered as abstract propositions apart from the facts involved in the cases in which they have been used, would appear to be irreconcilable. That condition, however, largely disappears when the facts presented in these various cases are carefully examined. It would be quite impossible, within the limits of this opinion, to make any extended reference to even a part of these cases.

As our Supreme Court pointed out in Bristol & Gale v. Industrial Commission, 292 Ill. 16, "It is impossible to lay down a hard and fast general rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employees or independent contractors. Each case must depend on its own facts. Ordinarily, no one feature of the relation is determinative but all must be considered together", and again in Harding v. St. Louis Stock Yards, 242 Ill. 444, where our Supreme Court said, "No absolute or arbitrary rule can be laid down by which it can be plainly seen in every case whether a person is the servant of the general or special master, as these terms are used in the decisions. The special facts of each case must be looked to in order to reach a proper conclusion."

There are some general propositions, however, which may safely be laid down. The law recognizes that a servant in the general service of one, may be transferred, under contract or otherwise, to the service of another, so as to become for the time the latter's servant, with all the legal consequences of that relationship. Delaware & Hudson R. R. Co. v. Van Derpool, 292 Fed. 688; P.C.C. & St. L. R.R. v.

Bovard, 223 Ill. 176; Harding v. St. Louis Stock Yards, 242 Ill. 444; Consolidated Fire Works Co. v. Koehl, 190 Ill. 145; Coughlan v. Cambridge. 166 Mass. 268.

When injury results from the negligence of an employee who is a servant in the general employ of one and in the special employ of another, the question arises, as to which of the two employers was his master at the time of his negligent act. The answer to that question is to be found in the circumstances surrounding each particular case, and its solution is frequently not free from difficulty. As an aid to answering this question, the courts have laid down several different lines of inquiry, two of which are, in our opinion, particularly helpful, namely; Whose work was the servant doing at the time in question and under whose control was he doing it? Delaware & Hudson Ry. Co. v. VandDerpool, 292 Fed. 688. In Standard Oil Co. v. Anderson, 212 U.S. 215, from which we quoted extensively in Bosco v. Boston Store of Chicago, 229 Ill. App. 564, the United States Supreme Court said: "To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed,- a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work," and the Illinois Supreme Court laid down a similar rule in Harding v. St. Louis Stock Yards, 242 Ill. 444, where the court quoted from Higgins v. Western Union Telegraph Co., 156 N.Y. 75, to the effect that "Servants who are employed and paid by one person may nevertheless be ad hoc the servants of another in a particular transaction," and then said, "the master is he in whose business the servant is engaged at the

time and who has the right to control and direct the servant's conduct." Another recent case in this court, presenting this question was Perong v. Eudeikes, 283 Ill. App. 72, where it was said that the question of whether the negligent employee was in the service of the defendant depended upon whether or not the driver of the automobile at thetime of the accident was engaged in doing the owner's business".

Of course, in one sense, where a servant in the general service of one is transferred under some form of contract to the special service of another he may be said to be in the service of both parties. But, in all cases, it will be found that in carrying out his duties he will be primarily performing the work of one of his employers and only secondarily or incidentally that of the other. For example, in the Bosco case, supra, a chauffeur, Tubbs, was in the general employ of the Grabowsky Power Wagon Company, which was anxious to bring about a sale of certain automobile trucks to the Boston Store, and with that in mind the Wagon Company entered into an arrangement with the Boston Store, whereby one or two of these trucks were to be lettered with the name of the Boston Store, and be used by it in the transportation of its merchandise and under its direction, and one of these trucks, while in charge of and being driven by Tubbs, injured the plaintiff. There, Tubbs, in driving the truck, was in a sense performing the work of the Wagon Company and in another sense, performing the work of the Boston Store, but the latter was held to be incidental to the main work

he was engaged in, which was to operate the truck and demonstrate it to the Boston Store, for his general employer, the Wagon Company. In our opinion, the case at bar presents the opposite of that situation. Here the driver of the automobile, whose name was Brooks, was in the general employ of Saracino and as such, in driving the automobile in question he was in a general sense, engaged in Saracino's business. But, primarily, the automobile in the case at bar was being operated in connection with the defendant's business, and in transporting the plaintiff and his family on the occasion in question, the work which Brooks was performing was the defendant's work, and not Saracino's. The automobile was hired by the defendant by the day. The defendant had a large number of automobiles, according to the evidence, on the subdivision in which the plaintiff was interested, and these were engaged throughout the day in carrying the defendant's customers from the depot to the subdivision and back again, and were entirely subject to the defendant's orders, as to when and where they were to go. It is clear from the evidence that if the defendant chose to make use of this car, apart from trips between the depot and this subdivision, and direct Brooks to take customers from his office to their homes, in distant parts of the city, he was at liberty to do so. In other words, the car was his for the day to do with just as he chose in connection with the operation of his business. In this connection, one Gelender, the defendant's traffic manager, testified that these automobiles, such as the one involved in this case, "were delivered to me for Mr. Bartlett's service * * * and from the time they arrived at the place where I told them to arrive at, I

took charge of them in our business until I sent them back home," presumably to Saracino's garage. That testimony demonstrates, in our opinion, beyond any question, that when the chauffeur Brooks was transporting the plaintiff and his family from the defendant's subdivision back to their home, he was primarily engaged in the defendant's service and performing the defendant's business.

Turning to the other question referred to, namely, the control and use of the automobile and the work of the driver, Brooks, at the time in question, we reach the same conclusion, for, in our opinion, his work was under the control of the defendant. In this connection, it is necessary to carefully distinguish, as pointed out in Standard Oil Co. v. Anderson, 212 U. S. 215, "between authoritative direction and control and mere suggestion as to details or necessary cooperation, where the work is a part of a larger undertaking." Thermere right to direct a chauffeur, as to the route he is to take, or to go to some designated place, may not be sufficient to demonstrate that the work of the chauffeur is being controlled by the one exercising such a right. This court so held in the Bosco case, supra. And in the case at bar we do not hold that the use of the car and the work of Brooks was Under the control of the defendant, when the plaintiff was injured, merely because the defendant had the power to and did direct Brooks to take the plaintiff and his family home, but rather, because the car was hired out to the defendant by the day, to be used by him in conducting his business, as he chose, and with full power and authority to make whatever use

of it he cared to in that connection.

There are decisions, to some of which the defendant has directed our attention, containing expressions to the effect that the control of servants does not exist apart from the right to hire and discharge them. But, in our opinion, that is not necessarily the case. In Denver & Rio Grande R. R. Co. v. Gustafson, 21 Col. 393, quoted by this court with approval in Wise v. Getting Bros. Ice Co., 212 Ill. App. 321, the court pointed out that "employment and payment of a person are not indispensable elements to charge one as master, for the negligence of such one who renders him service." In Delaware & Hudson Ry. Co. v. Van Derpool, 292 Fed. 688, it was held that the right to discharge, or the lack of it, did not determine the character of the control of the employee. Although the employee may be in the general employ of one who hired him, and who, in the last analysis, is the only one who may discharge him, nevertheless, he may be turned over, under contract of special employment, to another to perform some service for that other, under such circumstances as to constitute him the latter's servant, so as to make the latter liable for the consequences of his negligence, without transferring to the latter the right to discharge him. Under such circumstances, no doubt, the special employer, if the employee's services become unsatisfactory, would have the right to discharge or discontinue his services and turn him over to the general employer, from whom he had been received, for that reason. In this connection, to paraphrase what the court said in Delaware & Hudson Ry. Co. v. Van Derpool, 292 Fed. 688,

it may be said here that, inasmuch as Brooks was in the general employ of Saracino, he alone had the power to discharge him, and when he came into the special service of the defendant, Bartlett, the latter, of course, did not have that power, but he did, however, have power in case Brooks' services became unsatisfactory, to refuse thereafter to allow him to continue in the special service.

It appears from the record that to all outward appearances, the automobile in question belonged to the defendant and Brooks was his employee. The automobile in question was a Locomobile touring car. It had no lettering or marks of any kind upon it. The plaintiff testified that the defendant's sales manager at the subdivision in question, upon learning when the plaintiff wanted to reach his home, said he would not be able to make it with the Illinois Central trains, and added, "I will send you home in one of our cars." In giving his testimony the sales manager testified substantially to the same effect.

A number of the cases to which the defendant has called our attention present situations in which one, having no connection whatever with either the general or special employer of the driver of a vehicle, has been injured by reason of the negligence of such driver. Foster v. Wadsworth-Howland Co., 168 Ill. 514, is an example of that type of case. The case at bar presents a somewhat different situation. Here, the defendant Bartlett, maintained a traffic department for the benefit of his customers, one of whom was the plaintiff, and in the course of his dealings with the plaintiff

he held out the car in question and Brooks the chauffeur, as a car and chauffeur engaged in his service and he offered to place them at the plaintiff's disposition in reaching his home. In other words, the evidence shows a course of business pursued by the defendant, Bartlett, amounting to a representation on his part that the automobile was in his possession and control and that Brooks was engaged in his service. On this evidence also, and in view of the fact that the defendant pursued this course of dealing, in serving his customers, for the benefits that would thereby accrue to him, we are of the opinion that the verdict involving the finding that Brooks was the servant, on the occasion in question, of Bartlett, and that he was liable for the conceded negligence of Brooks, was justified. Such was the effect of the holding of this court in a somewhat similar situation, in Sing v. Getting Bros. Ice Co., 212 Ill. App. 331. In that case, this court quoted Denver & Rio Grande Ry. Co. v. Gustafson, 21 Col. 393, with approval, to the effect that "When one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his services, he is liable, as a master, for the negligence of such servant, when the act or failure constituting the negligence comes within the apparent scope of the servant's employment, even though the person for whom such service is rendered has not employed or paid the servant."

In Marler v. Martin, 319 Ill. 647, the defendant operated an auto livery business and the plaintiff telephoned the place of business of the defendant and ordered a taxicab.

Shortly thereafter, such a cab arrived at the place designated by the plaintiff, and the chauffeur announced his arrival by saying, "Martin Auto Livery" which was the name under which the defendant did business. The plaintiff entered the cab and directed the chauffeur where to go and in the course of the trip the plaintiff was injured, by reason of the chauffeur's negligence. The evidence showed that the cab which was sent by the defendant for the use of the plaintiff, was not one of the defendant's cabs, but was one procured by the defendant to fill this order, from the American Cab Company, and the chauffeur operating the cab was an employee of the latter company. This court held that under the circumstances, the defendant was liable for the plaintiff's injuries caused by the negligence of the chauffeur. In the course of the opinion this court said: "When the defendant undertook to furnish the plaintiff a taxicab * * * such taxicab and chauffeur became pro hac vice the taxicab and chauffeur of defendant, Margaret Martin, and her duty and liability in respect thereto were not affected by the fact that she had borrowed or hired said taxicab and chauffeur from the American Cab Company for the purpose of furnishing same to plaintiff," citing Smith v. Devlin, 127 Ill. App. 492, a case presenting a similar situation, where the holding of the court was to the same effect.

Harding v. St. Louis Stock Yards, 242 Ill. 444, to which we have referred above, is one of the cases relied upon by the defendant. In our opinion, the decision rendered in that case does not support the defendant's contentions here. In the case cited the plaintiff, Harding, was the administrator

of the Estate of one Magill, who had been an employee of Armour & Co. The latter Company was engaged in the meat packing industry, and in that connection maintained a packing house in East St. Louis, and for the purpose of its work it also maintained railroad tracks, yards and switches, in and about the packinghouse. The St. Louis Stock Yards maintained stock yards at East St. Louis and was also engaged in a general switching business, delivering loaded cars to the various railroads, from the packing houses, and receiving empty cars from the railroads and delivering them to the packing houses. The switching for Armour & Co. was done by the St. Louis Stock Yards, under a contract, by which an engine and crew in the employ of the St. Louis Stock Yards were under the charge of a foreman employed by it to direct the details of the work. Such an engine and crew was sent to the packing plant of Armour & Co. each day. For this service Armour & Co. paid the St. Louis Stock Yards, under the contract, at the rate of one dollar per car. In the course of a switching operation, Magill, who was engaged in the work of repairing a car, was injured through the negligence of the switching crew. An action was brought to recover the damages occasioned by his injury, against both the St. Louis Stock Yards and Armour & Co. At the close of the evidence the plaintiff dismissed his suit as to Armour & Co., after which the jury returned a verdict in favor of the plaintiff and against the St. Louis Stock Yards; and on appeal that judgment was affirmed. It will be seen from the facts recited that in that case the negligent employees were in the general employ of the stock yards, and under the contract of the

latter with Armour & Co. they were, at the time of the commission of the negligent acts, engaged in the special service of Armour & Co. In affirming the judgment against the general employer, the St. Louis Stock Yards, the Supreme Court merely held that on the facts shown in the record it could not be said, as a matter of law, as contended by the St. Louis Stock Yards, on the appeal, "that the switching crew were at the time of the accident such special servants of Armour & Co. that the said Company only (Armour & Co.) could be held liable for the negligence which caused the injury." The evidence showed that a foreman of Armour & Co. gave a list of the cars, or stated, to the foreman of the switching crew, which cars were to be transferred from one track to another, or taken from the yards to the railroads, or brought from the railroads into the yards, but that fact did not, enable the court to say, as a matter of law, that Armour & Co. alone could be held liable. The accident to Magill was caused by the misplacing of a switch, which was entirely within the scope of the work of the switching crew and not under the discretion of the foreman of Armour & Co. The court in the course of its opinion said: "The evidence was such that the court cannot say, as a matter of law, that the switching crew were loaned to Armour & Co., so that they became subject to said Company's control in doing the particular work which caused the accident. Viewing this evidence in the light most favorable to the appellants' (St. Louis Stock Yards) contentions, this was a question of fact to be submitted to the jury under proper instruction."

The case of Mansfield v. Shapiro, Illinois Appellate Court, First District, Case No. 28896, opinion filed October

labour with Armour & Co. they were, at the time of the accident to the employee, engaged in the special service of Armour & Co. In affirming the judgment against the general employer, the St. Louis Stock Yards, the Supreme Court merely held that on the facts shown in the record it could not be said, as a matter of law, as contended by the St. Louis Stock Yards, in its appeal, that the switching crew were at the time of the accident such special servants of Armour & Co. that the said company alone (Armour & Co.) would be held liable for the negligence which caused the injury. The evidence showed that a foreman of Armour & Co. gave a list of the cars, or slips, to the foreman of the switching crew, which was said to be preparatory [illegible], or cars from the yards of the railroads, as brought from the railroads into the yards, but that fact did not, enable the court to say, as a matter of law, that Armour & Co. alone could be held liable. The accident it [illegible] was caused by the displacing of a switch, which was entirely within the scope of the work of the switching crew and not under the direction of the foreman of Armour & Co. The court in the course of its opinion said: "The evidence was such that the court cannot say, as a matter of law, that the switching crew were loaned to Armour & Co., so that they became subject to said Company's control in doing the particular work which caused the accident. Viewing this evidence in the light most favorable to the appellants' (St. Louis Stock Yards) contentions, this was a question of fact to be submitted to the jury under proper instructions."

The case of [illegible] v. Chicago, Illinois Appellate

30, 1924, not yet reported, to which counsel for defendant refer in their reply brief, presented a state of facts so entirely different from the facts involved here, as, in our opinion, makes that case not at all in point.

The defendant complains of certain rulings of the trial court on the admission of evidence. It appears from the testimony of the plaintiff that when he had made his first trip to the defendant's subdivision about a month prior to the occurrence involved in this case, he was taken down there in one of the automobiles being used by the defendant in connection with the sale of lots in the subdivision, and when the plaintiff was testifying to the effect that on the occasion of his second visit, when the sales manager suggested that he would not reach his home at the desired hour, if he waited for a train, but that he could get home in time by using one of the defendant's automobiles, the plaintiff testified that he said he did not care to go home in a car but preferred to go back on the Illinois Central, because, "owing to the experience we had on our previous trip, I didn't think it was very safe." Several other references were made, at different points in his testimony, to some trouble in connection with the former trip, and this line of evidence was objected to on the ground that it was immaterial. The objection was overruled and the evidence admitted. In our opinion, evidence as to what occurred in connection with a prior trip, in the way of showing that the plaintiff went out by automobile, and the things that were said and done by the defendant's representatives in connection with furnishing

the plaintiff with a car, were material, as showing the method pursued by the defendant in the conduct of his business. We arefurther of the opinion that nothing prejudicial to the defendant occurred in connection with such references as were made in the testimony, to the difficulty which the plaintiff experienced on that prior trip. It was clearly brought out that this difficulty amounted to nothing beyond tire trouble, which resulted in the plaintiff being delayed in reaching his home. Inasmuch as the plaintiff was endeavoring, on the second trip, to get to his home at a fixed time, it was not unnatural that the delay he had experienced on the prior trip caused him to hesitate.

The trial court admitted in evidence, over the defendant's objection, a deed conveying the lot which was ultimately selected by the plaintiff and his wife on the occasion of their second trip to the subdivision. This deed was offered "for the purpose of showing confirmation or ratification of all the arrangements made by" the defendant's agent for selling the lots to the plaintiff and his wife, "by showing that their sales were consummated by the sanction and delivery of the deed." The deed was, of course, evidence that the sale in question was consummated, but it is difficult to see how the fact that the sale was consummated and the deed delivered could have the effect of ratifying "all the arrangements made" by the defendant's agents in connection with the sale. The arrangements referred to in connection with the offering of this deed were presumably the arrange-

ments made by the defendant's agents for transporting the plaintiff, by this automobile in which he was riding when he was injured. In our opinion, the fact that a deed was ultimately executed was wholly immaterial as far as ratification of the automobile arrangements was concerned. It might be considered some evidence of the fact that the agents involved in the transaction were, in fact, the defendant's agents and authorized to represent him in the sale of the lot, and anything else they might have occasion to do in the accomplishing of the sale, but apparently no question was ever raised by the defendant, as to the fact that the agents referred to, were his agents, with full authority to represent him. However, we arefurther of the opinion that whatever error may have been involved in the ruling of the trial court, in overruling the defendant's objections to the admission of this deed, was in no way prejudicial. Defendant makes the further objection that prejudicial error is to be found in the record in connection with the offer of evidence, and some statements made by counsel, in connection with the offer, involving one John D. Saracino (not J. T. Saracino, who was then in the case as a co-defendant with the defendant, Bartlett.) Counsel for the plaintiff offered to show that John D. Saracino had been served with a subpoena duces tecum, and had been paid his witness fees, but had not appeared in response to the subpoena, and the court was asked to issue an attachment for him. It was apparently made clear at that time that the witness who was sought was not the defendant then before the court. The trial court asked if the man named in the subpoena was the defendant and counsel replied

Words made by the defendant's counsel for transferring the plaintiff's by this automobile in which he was riding upon be and injured. In our opinion, the fact that a deed was ultimately executed was wholly immaterial as far as validity of the revocable arrangements was concerned. It might be considered some evidence of the fact that the parties involved in the transaction were, in fact, the defendant's agents and authorized to represent him in the sale of the lot, and anything else they might have done in the arrangement of the sale, but apparently no question was ever raised by the defendant, as to the fact that the agents referred to were his agents, with full authority to represent him.

Finally, on a further of the opinion that whatever error may have been involved in the ruling of the trial court, in overruling the defendant's objections to the admission of this deed, was in no way prejudicial. Defendant makes the further objection that prejudicial error is to be found in the record in connection with the offer of evidence, and some statements made by counsel, in connection with the offer, involving one John D. Gunning (not . T. Gunning, who was then in the same as a co-defendant with the defendant, Curlett.) Counsel for the plaintiff offered to show that John D. Gunning had been served with a subpoena duces tecum, and had been paid his witness fees, but had not responded to subpoena to the subpoena, and the court was asked to issue an attachment for him. It was apparently made clear at that time that the witness who was sought was not the defendant then before the court. The trial court asked if the man

that he was not. By his amended declaration, the plaintiff had made the Central Auto Service, a corporation, party defendant. It developed that Saracino had conducted his business under the name and style of Central Auto Service, and that subsequent to the plaintiff's injury the business was incorporated under that name. Ultimately, the corporation was found not guilty by direction of the court. Complaint is made that in connection with his cross-examination of Saracino, counsel for the plaintiff attempted to show that he was "covering up". In our opinion, nothing amounting to error occurred in the trial of the case, in connection with either of these incidents.

The final contention urged by the defendant in support of his appeal, is that the amount of the judgment, $25,000.00, is excessive. The plaintiff testified that when he was thrown out of the automobile he turned over and came down on the street in a sitting position and was then thrown back on his head, his head striking the street with a bump that was hard enough to daze him and make him dizzy. He immediately felt an intense pain in the right groin,- so much so that he was not able to get up. He further said that his whole head was sore and that he experienced pain on the right side of his head around his ear and eye; that this was the situation as soon as his head became clear enough to enable him to appreciate where he was. Prior to his injury, the plaintiff, who was a man about 48 years of age, had enjoyed excellent health. He weighed about 210 pounds; was well built, and had engaged in all forms of exercise and gymnastics in his younger days. At the time he was injured he was conduct-

ing his own business as a baker. He had never experienced any pain or inconvenience or soreness in the right groin; had never suffered from any kind of hernia and had never had any trouble with his head or eyes. He was taken to a hospital, from the place of the accident, where he was examined and the doctor found a condition which he described as an acute scrotusatic inguinal hernia in the right inguinal canal. The doctor reduced this hernia and applied a bandage, and after that the plaintiff was taken to his home. A few days later he was again taken to the hospital where he was operated upon for the hernia above described, and apparently, that operation was entirely successful. The plaintiff testified that during the week following the accident he had a great deal of headache, which was morepronounced on the right side. After he had been operated upon for his hernia, and while he was recuperating from the effects of the operation, in the hospital, he "felt as though spider webs formed over my eyes; black soot dropping down over my right eye; no such similar sensation in the left." The plaintiff was injured on June 23, and his operation took place on July 1, 1918. The plaintiff further testified that after he left the hospital, and along in August, the condition he described, as to his right eye, began to get worse and his vision grew dim. He consulted an optician and then an eye specialist, and remained under the care of the latter for some months. He testified that the pain in his right eye became so excruciating that he could not stand it; that this excruciating pain began in the fall and reached its worst stage the following spring, and that he had suffered with it ever since. He was testify-

ing in July 1923. By the spring of 1919, the sight had left his right eye and has never returned. During this period the plaintiff employed a man to take his place in the bakery business, to whom he paid $45.00 a week. Some time after his injury the plaintiff sold out his business. So far as the record shows he has done no business since then. The medical testimony submitted in his behalf was to the effect that he had suffered a hardening of the eyeball; that when the eye was first examined it presented a case of what the occulist described as incipient cataract,- a cataract had begun to form but had not fully developed. It was shown that an examination of the plaintiff's eye disclosed a detachment of the retina on the nasal side. It appears from the testimony that a case of Glaucoma of an acute type developed and at times this caused the plaintiff extreme pain, and one of the specialists who testified in behalf of the plaintiff stated that the eye should have been removed long ago. So far as the testimony in the record shows, the left eye has remained normal. There is some conflict in the testimony in the record, on the question of whether or not the hernia and also whether or not the eye condition above referred to, could have resulted from the injury received by the plaintiff at the time he was thrown out of the automobile, but, in our opinion, there is sufficient in the record to warrant a finding to the effect that both of these matters could come from that cause. At least, it may not be said that the verdict for the plaintiff is against the manifest weight of the evidence on those questions.

The jury returned their verdict, fixing the plaintiff's damages at $40,000.00, in connection with their finding of guilty as to the two defendants, Barrlett and Saracino. After the trial court had overruled motions for a new trial, submitted on behalf of each of the defendants, and had granted the motion of the defendant, Saracino, for a judgment non obstante veredicto as to him, the court overruled a similar motion submitted in behalf of the defendant, Bartlett, and before entering judgment in favor of the plaintiff, required him to remit $15,000.00 from the amount of the verdict. Judgment was then entered for the plaintiff for $25,000.00. If Saracino was to be eliminated from the case and the plaintiff was to be limited to a recovery against the defendant, Bartlett, if he was to recover at all, it seems unfortunate that this result was not accomplished before the issues were submitted to a jury. Of course, the plaintiff, if he was to recover, should be limited as to his damages, to such amount as the jury might believe would reasonably compensate him, so far as money damages could accomplish that result, for the weakened condition occasioned by the hernia and the loss of his right eye, and the pain and suffering which he had experienced, and the expense which he had been obliged to undergo as the result of these injuries. In this connection it seems entirely clear from the evidence that he was confronted at the time of the trial with a further operation for the removal of his eye. Although this was the theoretical situation, we are not unmindful of the inclination of juries to improperly take into consideration other matters, such as the number of defendants in the case, for example. Possibly the trial court had some such

The jury returned with verdicts, finding the plaintiff's damages at $50,000.00, in connection with their finding of guilty on the two defendants, Herbert and Benjamin. After the trial court had overruled motions for a new trial, which had on behalf of each of the defendants, and had granted the motion of the defendant, Benjamin, for a judgment n.o.v. [illegible] the trial court, on [illegible] motions, [illegible] the plaintiff's damages to $30,000.00 from the amount of the verdict. Judgments were then entered for the plaintiff for $30,000.00. [illegible] was entitled to [illegible] the [illegible] and it be limited to [illegible] [illegible] it is for a recovery at all, it seems unfortunate that this result was not discovered before the issues were submitted to a jury. Of course, the plaintiff, if he was to recover, should be limited as to his damages, to such amount as the jury of his fellows would reasonably compensate him, so far as money damages could accomplish that result. For the wanton conduct occasioned by his injuries and the loss of his right eye, and the pain and suffering which he had experienced, and the expense which he had been obliged to undergo as the result of these injuries. In this connection it seems outwardly clear from the evidence that he was unconscious at the time of the trial with a fractured cranium for the removal of his eye. Although this was the theoretical situation, we are not unmindful of the inclination of juries to improperly take into consideration other matters, such as the number of defendants in the case, or, as the possibility was that I could had some [illegible]

thing in mind when he required the plaintiff to remit $15,000.00.

Of course, the defendant Bartlett is not in a position to complain because the trial court overruled the motion for a directed verdict submitted in behalf of the defendant Saracino. The position of Bartlett has always been that Saracino should be held liable, if anyone was to be held, to pay the plaintiff's damages. The defendant Bartlett does complain because the trial court eliminated Saracino from the case by granting the motion of the latter for judgment in his favor non obstante veredicto. The contention is made in behalf of the defendant Bartlett that it is never proper to enter judgment non obstante veredicto, on the evidence, but only on the pleadings, and the point is made that such a judgment in favor of Saracino is not justified on the pleadings in this case, but was apparently entered by the trial court merely because the verdict was, in the court's opinion, against the weight of the evidence, as to Saracino, citing 11 Enc. Pl. and Pr. 917. In our opinion this point is not well taken. The same authority points out that a judgment non obstante veredicto may be granted where the verdict is not sustained by any evidence whatever, citing cases. We are of the opinion that there is no evidence in the record in the case at bar which would sustain a verdict against Saracino. We have already indicated that a better record would have been presented, in our opinion, if the motion for a directed verdict, submitted in behalf of Saracino, had been allowed. A judgment should not be reversed and another trial ordered, solely

for the purpose of making a more consistent record. This case has been tried twice. In our opinion, the evidence clearly demonstrates that the plaintiff is entitled to damages, and we have stated the reasons why we are equally clear, on the evidence in the record, that Bartlett is the one who should be required to pay him such damages. In that situation, the judgment should be affirmed.

The defendant has referred us to numerous decisions on the question of what the damages may properly be in a case involving injuries similar to those complained of by the plaintiff in the case at bar. On the question of damages, other decisions are frequently not very helpful. Particularly is this true at the present time in the case of decisions which were rendered some years ago when the value of money was far above the value it has today. We have given careful thought to the defendant's contention to the effect that the damages awarded the plaintiff by the judgment appealed from, are excessive, and in view of all the circumstances disclosed by the evidence in the record, we have come to the conclusion that the action of the trial court in this regard should not be disturbed.

For the reasons we have given, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. CONCURS;
TAYLOR, J. DISSENTS.

28 - 29100.

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

MORROW HARDING,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

237 I.A. 624

Opinion filed Feb. 11, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Harding seeks to reverse a judgment of the Municipal Court of Chicago, wherein he was found guilty of assault with a deadly weapon; fined $100.00 and costs and sentenced to serve a term of six months in the House of Correction, of the City of Chicago.

In support of his appeal the defendant makes two contentions, first, that the information on which his trial was based was defective, in that it charged him with assault with a deadly weapon, namely, a loaded revolver, in violation of the statute, without setting forth either that no consideration provocation appeared or that the circumstances of the assault showed an abandoned and malignant heart; and second, that the record fails to disclose that there was either an arraignment or a plea entered by him.

As to both of these points, it is sufficient to say, that a complete record of the case has never been filed in this court. The record filed contains nothing but the warrant of

commitment and the information. The certificate of the clerk of the Municipal Court, certifying to the contents of the record, is made up on a form entitled, "Certificate of Copy" and it is to the effect that the foregoing documents are "a true, perfect and complete copy of certain proceedings made and entered of record in said court; also of a certain information filed on the 10th day of September A. D. 1933." Without a complete transcript of the record, this court will presume that such proceedings were had in the trial court as to support the judgment which was there entered. According to the warrant of commitment contained in the record, the court found the defendant guilty of a "wilfull and malicious assault with a deadly weapon, without any considerable provocation and under circumstances showing an abandoned and malignant heart, with intent then and there to inflict a bodily injury." From aught that appears in the record filed in this court, that finding of the trial court was supported by a proper amended information upon a hearing of the issues made up of such information and the filing of an appropriate plea by the defendant, upon proper arraignment.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

84 - 29171

PEOPLE OF THE STATE OF ILLINOIS,
EX REL NANCY HEALY,

Defendant in Error,

v.

EDWIN ROBIE,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

237 I.A. 624

Opinion filed Feb. 11, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant Robie seeks to reverse a judgment of the Municipal Court of Chicago, wherein the court found that the relatrix, Nancy Healy, was delivered of a bastard child, born alive, on March 13, 1923, and that the defendant, "on his confession in open court" was the father of the child, and wherein the court ordered that the defendant pay the clerk of the court, for the support, maintenance and education of said child, the sum of $1100.00, payable as set forth in the order.

In support of his writ of error the defendant contends that the trial court erred in finding that he was the father of the bastard child in question "on his confession in open court," the fact being that he filed a plea of not guilty, and in thecourse of his testimony denied that he was the father of the child. Counsel for the People admit that the clause quoted should not have been included in the court's finding. How it came to be made a part of the finding does not appear. In our opinion, it should be disregarded and considered as surplusage. Verdicts and findings are not

Opinion filed Feb. 11, 1938.

construed as strictly as pleadings and the record may be searched in determining their sufficiency. The People v. Shupe, 306 Ill. 31; citing People v. Tierney, 290 Ill. 513, and People v. Patrick, 277 Ill. 210. In the latter case the court said: "Verdicts should have a reasonable intendment and receive a reasonable construction, and should not be set aside unless from necessity originating in doubt as to their meaning or from an immateriality of the issue found or a failure to find upon some material issue involved."

The only other contention made by the defendant is, in substance, to the effect that the finding and judgment are against the manifest weight of the evidence. The substance of the testimony of the relatrix was that she met the defendant in the summer of 1921, and saw him on a few occasions, and then did not see him again until May 1922. It would seem from her testimony that the first time the defendant had improper relations with her was in May 1922, and she testified that he had intercourse with her frequently from that time until sometime in the month of September of that year; that she did not see him after that until on one occasion about Christmas, 1922; that her baby was born the following March. She further testified that her last menstruation took place in the month of June, 1922. She had a friend whose name was Edna Johnson, who was one of the witnesses in this case, and the relatrix testified that when she did not experience her period of menstruation in July, she told her friend, Miss Johnson, about it, who, she said, knew of the relations which existed between her and the defendant. She

further testified that she never told anyone else anything about it until apparently her mother noticed the change in her physical condition and questioned her.

The defendant admitted that after he became acquainted with the relatrix in 1921, he had sexual intercourse with her a number of times, but he testified that the last time was on April 35, or April 26, 1922. He further testified that he never took the relatrix out or was in her company after that date until the occasion when he met and talked with her on the street, about the holiday season of 1922. He said that he saw her now and then after the month of April and during the following summer, at different dance halls, where both would be present, and that he would nod to her and that was all. On cross-examination he admitted attending a party given by a married sister of Edna Johnson, after the month of April, 1922, and during the summer of that year, and that he attended that party with the relatrix and several others. The time of the party was fixed by the testimony of Edna Johnson as the 15th of June. She said she was able to remember the time because the following week her sister and mother left on a trip to Canada. This witness testified to a number of occasions after April 1922, and particularly in the month of June and July of that year, when she and the relatrix and the defendant and a friend of his were out together. The relatrix had also testified concerning these occasions and had stated that when they got home, the defendant would let Edna Johnson and her escort out of the car, near the home of the former, and would then take the relatrix home, and that the acts of intercourse which she described, took place after the others had

left the defendant's automobile. A sister of the relatrix testified that she saw the defendant in her sister's company on two occasions in the month of June, 1922. She was able to fix one as occurring on the evening of Sunday, June 11, because, she testified, that was her baby's birthday.

One Tansy, a friend of the defendant, testified that he had intercourse with the relatrix in the month of July, 1922; and one Ryan, another friend of the defendant, testified that he had intercourse with her in the month of June of that year. Another witness testified that he and Edna Johnson were out with Ryan and the relatrix on the occasion of the incident Ryan testified to. Tansy testified that his act of intercourse with the relatrix occurred about the middle of July, 1922. He testified further that this occurred at the home of one Quinlan; that Quinlan gave him the key to his home and that he and the relatrix went there, and they had sexual intercourse there, and that while they were there Quinlan came home. Quinlan lived at this place with his mother. He testified that on the occasion when he gave his key to Tansy and Tansy took the relatrix to his home, his mother was away; that he, Quinlan, reached home about four o'clock and that the relatrix and Tansy were there. This witness placed this occurrence in the first part of August. His mother also appeared and testified that she was not away during the month of July but was out of town the first Saturday in August.

The relatrix denied the story Tansy told about taking her to the home of Quinlan and there having intercourse with her, and she also denied having intercourse with

Ryan. In asking her about this, her counsel apparently inadvertently asked her if she, in June, 1922, went with Ryan to Quinlan's house and there had intercourse with him. Ryan had not testified to any occurrence involving the home of Quinlan. In his brief, counsel for the defendant argues that whereas the relatrix denied that she was in the company of Tansy in the home of Quinlan or had intercourse with him there, she did not deny that she had indulged in intercourse with Ryan, in the month of June, at another place which had been testified to by Ryan. We have pointed out that inadvertently her counsel did not ask her about that. We take her answer to counsel's question to be to the effect that she had no intercourse with Ryan in the month of June, as he testified. It is also contended that the relatrix did not deny that she had any intercourse with any other man in June, 1922, although she did make such denial with regard to May and July, 1922. Both of these points were covered by counsel for the defendant himself, during his cross-examination of the relatrix, when he asked her if she knew a man named Ryan, and she said she did not, and counsel then asked, "Were you out with any other man during the period from May until September last year?" (1922) and she answered, "No Sir;" and when he further asked her, "Were you in the company of any other gentlemen during June, July and August, 1922?" and the court added to the question,- "and while in the company of that other man did you have sexual intercourse?" and she answered, "No. Never."

A jury was waived in this case and the issues were submitted to the trial court. We have recited enough of the substance of the testimony to show that it was flatly contra-

dictory. The trial court saw these witnesses and was in a position to hear their oral testimony and observe their demeanor, and make up his mind who of them was telling the truth. On the record before us, it would be impossible, from the examination of the typewritten pages of the record and the printed pages of the abstract, to say that in our opinion the finding and judgment of the trial court were against the manifest weight of the evidence. The story told by the relatrix was not without corroboration on several points on which her testimony and that of the defendant and his witnesses was conflicting.

It is contended that the relatrix did not act as a normal, reasonable girl in her condition would, when, as she testifies, she continued to have improper relations with the defendant for at least two months after she discovered she was pregnant, and after she realized the defendant was the cause of her pregnancy, and when she talked with him, even as late as the latter part of December, within three months of the birth of her child, and still did not mention her condition to the defendant. On this question she was asked why she had not told the defendant of her condition and she answered, "Well, - I would have to go through with it anyway. Well,- why does he not speak up and tell why. He did not marry me." Her cross-examination along this line did not proceed further. She testified she didn't tell anybody about her condition nor make any mention of it, but that she told her friend, Edna Johnson, in July, that she had not experienced her usual period of menstruation. It may be admitted that normally one would expect a girl placed in the

position of the relatrix, to at least let the father of her unborn child know of her condition and possibly make some effort to induce him to give the child a name. But we cannot say that because she did not adopt that course, the trial court was not justified in believing her story. On all the evidence in the record, we would not consider a reversal of the judgment justified, on the ground that the finding was against the manifest weight of the evidence.

The bill of exceptions nowhere states that it contains all the evidence heard on the trial of the case, and in that state of the record, we would be justified in assuming without an examination of all the evidence, that the trial court heard sufficient to fully support its finding and the judgment entered; People, ex rel Betty Dunn v. Ray Moore, 188 Ill. App. 418, but we have preferred to examine the evidence, as it is contained in the bill of exceptions, with care, and pass upon the merits of the defendant's contentions.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

218 - 29507.

IDEAL TOOL & MANUFACTURING CO.,
a corp.,

Appellee,

v.

J. WADSWORTH STAFF,

Appellant.

237 I.A. 624

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 11, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Company brought this action of the first class, in the Municipal Court of Chicago, seeking to recover from the defendant the sum of $1614.80, which the plaintiff claimed as a balance due it for merchandise sold and delivered to the defendant according to a statement of account which was attached to the statement of claim. The issues were presented to a jury and at the close of the evidence, the court gave an instruction for the plaintiff, following which judgment was entered against the defendant, in the sum of $1407.60, to reverse which the defendant has perfected this appeal.

The plaintiff Company was a manufacturer of tools of various kinds. The defendant was a dealer in automotive equipment, including tools. Under date of May 21, 1921, the defendant gave the plaintiff an order in writing for nine thousand odd reamers. This order was apparently written up on one of the regular order blanks used by the defendant in connection with his business. It contained a detailed

Petition filed Feb. 11, 1881.

statement of the terms of payment, and shipment and,provided for certain detailed information on all invoices and also on the bills of lading, and it contained further a paragraph reading: "All reamers are to bear our imprint; beveled edge to act as lead; Groove in collar to take care of chips; In terchangeable blades. They are to be packed in oil proof paper with our label, and delivered to this office." The order called for a thousand each of reamers of types referred to in the order under the letters "A" to "H" inclusive, the order specifying certain prices for each type. These were to be delivered as specified. The order then directed that there be shipped at once, 100 each of the types "A" to "H" inclusive, and also 100 of a type referred to as "I" and 5 each of types referred to as "M" and "N". Following this the order set out the specifications for each type, including the limits of expansion of the blades and length over all of the reamers. The order did not contain any signature. Deliveries began under this order in August, 1921, and apparently deliveries were made from that time on, but just when the record does not show. Certain payments were also made by the defendant for these reamers, but apparently the defendant was in arrears as to payments, and in June, 1923, the plaintiff declined to make any further deliveries until past due accounts were paid, and the defendant declined to make any further payments, claiming that the reamers had not been manufactured as agreed and that they were defective. This suit was then instituted.

The main contention of the defendant in support of his appeal is that the trial court erred in sustaining the

plaintiff's objections to certain evidence offered in behalf of the defendant. While the defendant was on the witness stand he was shown two reamers, which were not manufactured by the plaintiff, and are referred to as sample reamers. They were introduced in evidence as defendant's Exhibits 3 and 4. The defendant testified that he had a talk with the president of the plaintiff Company, in the defendant's office, at the time he placed the order with the plaintiff - the order involved in this case. He then attempted to show that the written order did not contain all the specifications of the reamers, and that at the time the order was placed with the plaintiff, the defendant exhibited to the plaintiff's president, the sample reamer referred to as Exhibit 3. Objections to this line of questioning were sustained. The defendant was then asked whether any of the reamers made by the plaintiff Company were made like Exhibit 3. Objection to that question was also sustained. In our opinion, these ruling of the trial court were proper. The order purported to be a complete order, specifying the number and kinds of reamers to be manufactured by the plaintiff for the defendant. It is entirely clear that the reamers called for by the order could be manufactured without any specifications other than those set out in the written order. Cases referred to by the defendant, in support of his contention that the parol evidence offered should have been admitted, are in our opinion, not in point. Federal Rubber Manufacturing Co. v. Flow City Garage, 304 Ill. App. 128, lays down the rule that where a written contract for the sale of goods amounts only to an order for the goods, it may nevertheless be shown that there was a prior verbal warranty

as to the goods to be delivered. In Gult v. Hunt, 183 Ill. App. 77, parol evidence was admitted as to an agreement between the parties, which was entirely outside the subject matter of a subsequent written contract they entered into. In Offenberg v. Arrow Distilleries Co., 222 Ill. App. 512, there was involved a written order which did not purport to express the entire agreement between the parties, and it was there held that a prior oral agreement involving a warranty could be shown. In Bixler v. Brim, 206 Ill. App. 294, there was involved a written order for certain articles of jewelry. The court pointed out that while the order enumerated the different articles purchased, it did not describe them with such clearness or certainty that the purchaser could know what he was to receive in the absence of the sample shown by the salesman, at the time the order was placed. For example, the order called for "Emblem Pins," "Emblem Buttons" and "Emblem Charms." The court said that such items by themselves would convey little idea of the exact articles purchased, and parol evidence was proper, showing that the goods sent in fulfillment of the order did not correspond with samples exhibited by the salesman at the time the written order was given, and that such evidence "did not in the least tend to vary or change the terms of the written or der or contract." The case at bar is quite different. The written order involved here is entirely capable of execution without extrinsic explanation. No contention is made that such is not the case.

The defendant was later handed another reamer which appears in the record as defendant's Exhibit 4. This reamer, unlike Exhibit 3, has a groove in the collar and the defendant testified

that he had a talk with the plaintiff's president, at the plaintiff's factory, concerning the groove in the collar, sometime in August, 1921, after the written order in question had been placed with the plaintiff Company, and he testified that he gave the plaintiff specifications, at that time, "on the sample for this groove," referring to Exhibit 4, and he testified further that he told the plaintiff's president, "that this is just exactly the way I want the reamers made; that I wanted the groove made exactly like the sample I brought." The witness was then asked what kind of a groove the plaintiff made, and objection to this question was also sustained. In our opinion, this ruling was also proper. No evidence had been offered, to the effect that the parties had entered into any supplemental agreement changing the specifications for these reamers, as recited in the written order. The most that the defendant had testified was that he talked with the plaintiff's president in August, exhibiting a sample to him and telling him that he wanted the groove made like the sample. No evidence was offered, showing or tending to show, that at that time or any time thereafter, the plaintiff had undertaken to make reamers like the sample, and therefore the question of what kind of groove they made in the reamers delivered, was immaterial. The written order merely called for "a groove in collar to take care of chips." It did not specify any particular kind of groove, and, as stated above, no evidence was offered showing or tending to show any undertaking on the part of the plaintiff which would supplement or change the written order.

After the defendant had given some testimony, and a number of questions put to him had been objected to by counsel for the plaintiff, and these objections had been sustained, counsel for the defendant made an offer of proof,

to the effect that a sample tool had been submitted and that the plaintiff Company had guaranteed and agreed to make tools like the sample. It is entirely plain, from the offer made at this time, as it appears in the record, that counsel had referring to the conversation which the witness testified he had had with the president of the plaintiff Company, at the time the order in question was placed. In connection with this offer of proof, counsel for the defendant made a further offer as to a number of other matters, some of which up to that time had not been made the subject of any questions put to the witness, and therefore no objection had been raised to the proof offered, and further offers of proof were made which necessarily rested on the question of the right of the defendant to show that he had exhibited a sample to the plaintiff's president at the time the order was placed, and that the plaintiff had undertaken to manufacture tools like the sample. We have already stated that we are of the opinion such proof was incompetent, and it follows that any subsequent offer of proof, based on the contention that a sample had been exhibited at the time the order was placed, was unavailing. For instance, the defendant offered to show that, as a result of the failure of the plaintiff to make a tool like the sample, the defendant had suffered damages, which he sought to recover under a claim for set-off. In other words, we have here a case in which the defendant gave the plaintiff a specific written order for the manufacture of a certain quantity of reamers. As already stated, it would seem to be clear that this order was sufficiently specific to enable the plaintiff to go ahead and manufacture the tools

without any further information than that set forth in the written order. The order called for a groove in the collar of the reamer, but nothing was said, in the order, to the effect that this groove was to be made as directed or specified or according to sample, and, in our opinion, the defendant could not be permitted to show that at the time the order was placed, some particular shape of groove was specified according to sample, and that the plaintiff undertook to manufacture reamers with that kind of a groove. Of course, after the written order was given, the parties, if they chose, might enter into a supplemental agreement, varying its terms or provisions in some particular. Apparently the defendant attempted to make some such showing when he testified that in August he showed the plaintiff's president Exhibit 4, and that he told the plaintiff that he wanted the reamers made with a groove exactly like that shown in the sample, but he failed to prove or offer to prove that at that time the plaintiff undertook to manufacture the reamers in that manner.

As to the proof of the alleged defects in the reamers delivered, it appears that some of them were based upon the contention that the reamers were not like the sample. This proof was properly ruled out, for the reasons already stated. As to offers made by the defendant, so far as they involved other alleged defects, we are of the opinion that the offer submitted was insufficient. If the defendant had offered testimony to the effect that reamers manufactured by the plaintiff were, upon being subjected to proper tests or to the usual and ordinary use, found to contain material defects, such evidence would have been proper, but none such was offered so far as this record discloses.

After a careful examination of the testimony in the record, it seems to us to be clear that the claims the defendant was making against these reamers, were in the last analysis, based on his contention that they were not like the sample, - either the one exhibited to the plaintiff at the time the order was placed, or the one the defendant testified he exhibited later. In our opinion, this was not sufficient to make out a defense to the action brought, and as the record stood at the close of the evidence, the trial court was warranted in instructing the jury to find for the plaintiff. There was some evidence involving the return of a number of reamers, which was inconsequential. Most of these returned reamers had been repaired, and the statement of account contained certain debit items for these repairs, as to which there was no question raised in the affidavit of merits. The statement of account also contained a number of credit items for reamers returned. The defendant contended that the plaintiff had represented that it was equipped to take care of this work involved in the defendant's order, but that the plaintiff was not ecequipped, as is shown by the fact that something less that one half the total number of reamers involved in the order had been delivered at the end of a year; whereas, the order specifies delivery at once. In our opinion, the order does not justify that interpretation. It calls for the delivery of something over 900 of the reamers, at once, and "8000 to be delivered as specified."

Subsequent to the filing of an opinion in this case, we allowed defendant's petition for a re-hearing, but, after a careful reconsideration of this case, in the light of contentions advanced by counsel for the defendant, in that petition, and the argument of counsel for the plaintiff filed

in reply thereto, we have reached the conclusion that our original decision of this appeal, should stand. Our attention has been called by the defendant to the fact that the record shows that under date of April 22,1921, some three or four weeks prior to the time the defendant gave the plaintiff the order for the reamers, the president of the plaintiff Company wrote the defendant a letter, saying in part: "As per your conversation with our Mr. Renner, we beg to quote you $1.33 each on the Expansion Reamers, as per sample submitted, in lots of 1000 of a size." The contention is made that in view of this statement in writing, signed by the plaintiff or its president, the defendant should have been permitted to show not only what the sample was, which was submitted to the plaintiff at that time, but also what the conversation was, which took place between the parties with reference thereto, and to show that in the course of this conversation the defendant stated that he wanted reamers made exactly like the sample, except that the sample contained no groove in the collar, whereas the reamers to be manufactured were to contain a groove in the collar. In our opinion this letter did not make such evidence admissible.

When the defendant forwarded its written order for the reamers to the plaintiff, made out by it on one of its own order blanks, and expressed in language of its own choosing, and the plaintiff proceeded to execute that order, the latter became, under the facts in this case, the sole and only evidence of the contract between the parties. Whether it was the intention of the parties that this written order was to express their entire agreement is to be ascertained from an examination of that written document, and a determination of that question is one for the court. As already stated, an examination of the defendant's order would seem to disclose no reason for concluding that it

did not fully express the contract of the parties. No contention is made that the order is either meaningless or impossible of construction or execution without some extraneous explanation. It contains no intimation that the order was to be executed in compliance with any directions or specifications, outside of the order itself. In that case, parol evidence is not admissible to vary or alter the terms of the document. As was pointed out by the court in Thompson v. Libby, 34 Minn. 374, to allow a party to lay the foundation for parol evidence altering the terms of a written contract by oral testimony that only a part of the agreement was reduced to writing and then prove by parol the part omitted, would be to work in a circle and to permit the very evil which the rule prohibiting the alteration of a written contract by parol, was designed to prevent. That proposition is applicable not only to alleged oral communications between the parties but also to their statements in writing. As we had occasion to point out in the recent decision of The Northwestern Consolidated Milling Co. v. Sloan, Illinois Appellate Court; First District; case No. 26083; opinion filed February 20, 1934; not yet reported, "It is a well established rule of the law that when any contract, agreement or undertaking has been reduced to writing, its contents cannot be contradicted, altered, added to or varied, by parol or extrinsic evidence. While the matter excluded by this rule is commonly termed 'parol' which signifies and implies essentially the idea oral, - matter of speech as contrasted with matter of writing,' this idea is radically incorrect, because when the rule is applicable, what is excluded may be written as well as oral. The rule is in no sense a rule of evidence but a rule of substantive law. 5 Wigmore on Evidence, (2nd Ed.) Section 2400."

While the record shows further that counsel for the

defendant, while the latter was on the witness stand, put some questions to the witness which were in and of themselves proper, but to which the plaintiff interposed objections which the trial court sustained, relating to an alleged conversation between the parties which occurred after the defendant's order was given to the plaintiff, we are of the opinion that a reversal of this judgment would not be justified for that reason. In order to make out the defense interposed by the defendant in this case, it was necessary for him to show not only that the reamers, manufactured by the plaintiff and delivered to the defendant under this order, were such as did not comply in some material respect with the specifications contained in the order, or that they were different in some material respect from the sample submitted to the plaintiff, as alleged by the defendant, at their conference in August 1921, assuming an agreement at that time to manufacture like the sample, but also, that when these reamers, which were supplied by the plaintiff to the defendant, were in turn sold by the defendant to his customers and subjected to the usual, ordinary and proper use of such tools, by such customers, they failed, because of such defects, to render proper service and that they were not therefore, reasonably fit for the use for which they were intended. Several of the essential elements of that line of proof, necessary to make out the defendant's case, were not covered by the defendant, either in the way of questions put to witnesses or the offer of proof. The defendant merely attempted to show that reamers which had been delivered to him under this order by the plaintiff, had been shipped out by him to his customers and ultimately they had come back to him from the customers, who claimed that they were defective. No showing was made, nor was there any offer to show that these tools were defective when they were delivered to the

defendant originally or that the defects showed up in spite of the proper and ordinary use of the tools by the defendant's customers, or that the defects were such as were inherent in the tools and developed without regard to their use.

Further, we are not unmindful of the fact, as shown by the record in the companion case between these parties, in connection with which we filed an opinion on December 24, 1924, that after the plaintiff had made deliveries under this order, from time to time, beginning in August 1921, aggregating in amount over 4000 reamers, and after the defendant had paid the plaintiff, under the contract, over $3,000; and when the defendant was delinquent in certain payments claimed to be due by the plaintiff, in the spring of 1922, he gave the plaintiff certain trade acceptances, on which the plaintiff brought suit in the other case, and when these trade acceptances were not paid on their due date (the trade acceptances covering invoices dated from January 3, 1922, to and including April 13, 1922) and when the plaintiff wrote the defendant urging payment of them, the defendant replied, under as late a date as June 23, 1922, (the plaintiff's letter having been forwarded to New York) and in that letter the defendant assured the plaintiff that he would be in Chicago very shortly and at that time would arrange to make the plaintiff a substantial payment. In the case at bar, the defendant contended and offered to show, that the payments he had made for reamers delivered to him under this contract, were made by him in spite of the fact that the reamers delivered had been defective, and on the plaintiff's assurances that future deliveries would be all right. We are not much impressed by that

position now taken by the defendant. In the other case on which the defendant was sued by the plaintiff on the trade acceptances referred to, the defendant testified that he knew in May or June, 1922, "that all these reamers were defective and (I) made up my mind that I would not pay for them." As stated by us in the opinion filed in the other case, that testimony is entirely inconsistent with the letter written by the defendant to the plaintiff the latter part of June. And that testimony, taken with the letter referred to, is equally inconsistent with the position assumed by the defendant in the case at bar, to the effect that such payments as he did make, for reamers delivered under this contract, were made only because of the plaintiff's assurances with regard to those to be delivered in the future.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J. and
Taylor, J. concur.

99 - 29608

MARSHALL O. DENBBY,

Plaintiff in Error,

v.

FREDERICK H. BARTLETT, JOHN T. SARACINO, and CENTRAL AUTO SERVICE, a corp.,

Defendants in Error.

237 I.A. 624

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 11, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

This case has been consolidated for hearing in this court with case No. 29045. We are this day filing an opinion in the latter case, and in that opinion we have set forth the facts and circumstances involved in the controversy between the parties, and it will not be necessary to again set them out here.

In the course of the trial of the case, the Central Auto Service, a corporation, was found not guilty, by the direction of the court.

In pleading to the plaintiff's declaration, the defendant, Saracino, filed a plea of the general issue and a special plea, denying operation of the automobile at the time and place in question, and denying that the person operating the automobile was then and there his servant or agent. The evidence in this case has been presented to two juries. At the conclusion of the first hearing, the jury were unable to agree upon a verdict and were discharged, and subsequently,

Opinion filed Feb. 11, 1956.

another hearing was had resulting in a verdict against the defendants, Bartlett and Saracino, and judgment against Bartlett as set forth in the opinion in case No. 28045. At the conclusion of the first hearing, the plaintiff elected to take a non-suit as to the defendant, Saracino, and at that time judgment for Saracino for costs, was entered against the plaintiff. Later, the plaintiff was given leave to file additional counts to his declaration in the same case and to make Saracino and others additional parties defendant. Service was again had upon Saracino and he appeared specially for the purpose of objecting to the jurisdiction of the court, setting up that at the hearing of this cause theretofore had, the plaintiff had taken a non-suit as to him, and judgment had been entered in his favor, against the plaintiff for costs, which orders of non-suit and judgment had never been vacated or set aside. The plaintiff's demurrer to that plea was sustained. Still later, the plaintiff filed other additional counts to his declaration. To the declaration, as thus amended, the defendant Saracino filed a plea of the general issue and a special plea in which he set up the prior trial of the same cause and the taking of a voluntary non-suit by the plaintiff as to him, which order of non-suit and judgment against the plaintiff and in favor of Saracino for costs, were still in force. He also filed a further plea denying operation and management of the automobile, and denying that the person operating it at the time of the plaintiff's injuries was his servant or agent. To the plea setting up the order of non-suit and judgment against the plaintiff, in favor of Saracino for costs, at the close of the prior hearing, the

plaintiff demurred ore tenus, and this demurrer was sustained by the court. The trial of the cause then proceeded to a second hearing and at the close of the plaintiff's evidence, and again at the close of all the evidence, a motion was submitted to the trial court in behalf of the defendant, Saracino, requesting the court to direct the jury to find him not guilty, both of which motions the trial court denied. The issues were then submitted to the jury, as to the two defendants, Bartlett and Saracino, and the jury found the issues in favor of the plaintiff and against those two defendants and assessed the plaintiff's damages at the sum of $40,000.00. The plaintiff remitted $15,000 from the amount of that verdict. Each of the two defendants, Bartlett and Saracino then submitted motions for a new trial and both motions were denied. The defendant, Saracino, entered his motion for a judgment non obstante veredicto, and that motion was sustained and judgment entered in his favor, accordingly. Judgment was then entered in favor of the plaintiff and against the defendant Bartlett, for the sum of $25,000.00. Bartlett's appeal from that judgment is involved in case No. 29045, with which the case at bar has been consolidated in this court for hearing. The plaintiff, Denaby, sued out this writ of error, contending that the trial court erred in directing the jury to find the Central Auto Service not guilty, and allowing the motion of the defendant, Saracino, for judgment non obstante veredicto, and in entering judgment in Saracino's favor. The defendant, Saracino, has filed cross errors, contending that the trial court erred in sustaining the plaintiff's demurrers to his

pleas, in which he set up the fact that the plaintiff had taken a voluntary non-suit as to him, and judgment had been entered in his favor against the plaintiff for costs, at the close of the first hearing of the case, and also contending that the trial court erred in overruling his motions for a directed verdict at the close of the plaintiff's case, and again at the close of all the evidence, and also in overruling his motion for a new trial.

Counsel for the plaintiff frankly states in his brief in this court that he "has more faith in his client's right to his judgment against Mr. Bartlett than he has of his right to recover against Saracino, and of course if he cannot recover against Saracino he cannot prevail against Central Auto Service." The contention is then made that the plaintiff had a right to recover against Saracino as well as against Bartlett, because after Saracino had delivered his automobiles to Bartlett, under the arrangement which prevailed between them, to be used by Bartlett under his command and control, Saracino "to some extent was Bartlett's servant in the operation of the automobiles, and if so, might be jointly liable with Bartlett. * * * and if so, the Central Auto Service, being in reality an alias for Saracino, a name incorporated by him only to shield his assets, would also be liable." In support of this contention, counsel has cited the case of Hartley v. Miller, 165 Mich. 115. In our opinion, that case does not support the contention made. There, Hartley was run into and injured by an automobile which was owned by Miller, at a time when it was being operated by a third party, to whom Miller had loaned it, for the third party's personal

use, Miller, however, being a passenger in the automobile as a guest of the third party and at such third party's special request. At the close of the evidence, Miller's motion for a directed verdict was allowed and the case proceeded to a verdict and judgment against the third party. The plaintiff appealed, contending that the trial court had erred in granting Miller's motion for a directed verdict, but on appeal this action of the trial court was affirmed. So far as that case may be considered applicable to the case at bar, it would seem to be contrary to the contention advanced here.

In our opinion, on the evidence in this record, the liability to compensate the plaintiff for the injuries he received, rested upon either Bartlett or Saracino,- it could not rest upon both of them. As a general rule, one injured by the negligence of another must seek his remedy against the person causing the injury, but, as pointed out by our Supreme Court in Johnson v. Johnson Printing Co., 363 Ill. 336, the case of master and servant presents an exception to that general rule and the negligence of the servant, while acting within the scope of his authority, is imputed to the master and the latter will be held liable for damages caused by his servant's negligence. In order, however, to bring a case within that exception, it must be shown that the relation of master and servant exists between the person at fault and the one sought to be charged for the result of the wrong, and that relation must be shown to have existed at the time and in respect to the particular transaction out of which the injury arose.

We have endeavored to point out in the opinion filed in case No. 28045, that although a servant may be in the general employ of one person, the latter may, by contractual or other arrangement, turn such servant over to another for the doing of some special service, and if some one is injured by the negligence of such servant, while engaged in such special service for the other person, the latter will be liable. In determining whose the liability is in such a situation, we may look to the question of whose business the servant was engaged in performing at the time his negligent act caused the injuries complained of, and under whose control he was at that time. As further pointed out in that opinion, we have concluded from all the evidence in this case, that at the time the plaintiff was injured by reason of the negligence of the chauffeur, Brooks, the latter was engaged in performing the business of Bartlett and was under his control, and for that reason Bartlett is liable. For the same reason, and because, at the time and place in question, Brooks was not engaged in performing the business of Saracino, and was not under his control, Saracino is not liable. We will not repeat the references we have made to the authorities in the other opinion. We are, therefore, here of the opinion that the trial court erred in denying the motions interposed by the defendant, Saracino, for a directed verdict, and further, for reasons pointed out in the other opinion, that the trial court did not err in allowing the motion of the defendant Saracino for a judgment in his favor non <u>obstante veredicto.</u>

We are further of the opinion that the trial court

erred in sustaining the plaintiff's demurrers to the special pleas of the defendant Saracino, setting up the fact that the plaintiff had taken a voluntary non-suit as to such defendant at the close of the first hearing and that judgment had been entered in favor of that defendant for costs, at that time, and that such orders were still standing of record. Weisguth v. The Supreme Tribe of Ben Hur, 272 Ill. 541. However, Saracino must be considered to have waived his right to raise this point, as to the propriety of the action of the trial judge in ruling on these demurrers, by his participation in the trial on the merits. It was so held in the case cited, the court referring to to Herrington v. McCollum, 73 Ill. 476, where it was said, "The court, unquestionably, had jurisdiction of the subject-matter of the litigation; and it has never been questioned that parties may so far control jurisdiction over their own persons, in such a case, as to confer upon the court the right to proceed, by voluntarily entering an appearance. The defendants, to avail of the right to question the jurisdiction of the court when the case was reinstated, should either have not appeared at all, or limited their appearance to the objection against the jurisdiction of the court." In the Weisguth case, the defendant was not held to have forfeited his right to complain of the action of the trial court in allowing the plaintiff to reinstate a case in which he had entered a voluntary non-suit because the defendant had gone to trial on the merits, without raising the point, as is contended in the case at bar by counsel for Saracino, but because the defendant had pleaded to the merits and thus submitted himself to the jurisdiction of the court. That is also the situation here. If

the defendant's special plea, to which the plaintiff's demurrer was sustained was a good plea, the court had no jurisdiction over Saracino at all. If he wished to preserve the question of the ruling of the trial court, in sustaining the plaintiff's demurrer to that plea, he should not have filed pleas to the merits, whereby he voluntarily submitted himself to the jurisdiction of the court.

We are further of the opinion that the trial court did not err in directing a verdict in favor of the defendant Central Auto Service, a corporation. Irrespective of the question of such rights as the plaintiff may have had to proceed against that corporation, as a party defendant, if the facts were such as to make the defendant, Saracino, liable to respond in damages, as a consequence of the plaintiff's injuries, it is clear, as counsel for the plaintiff admits, that if Saracino is not liable, then the plaintiff can have no rights as against the Central Auto Service, a corporation.

For the reasons given, the judgment of the trial court, as to Saracino, and also as to the Central Auto Service, a corporation, is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

34 - 29436

237 I.A. 624

MARY E. PRECTOR,
Plaintiff in Error,

vs.

E. B. CHAPIN et al.,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks to have reversed a judgment in her favor for $40, entered over her objection upon a directed verdict.

The statement of claim alleges that on October 28, 1919, defendants were stock brokers, and that plaintiff, doing business under the name of Frederick C. Prector, directed them to buy for her fifty shares of the stock of the Minneapolis and St. Louis R. R. Co.; that defendants claimed and pretended to her that they had bought said stock for her on October 27, 1919, for $918.75, and believing such to be the fact, plaintiff paid them that amount; that "in truth and in fact said defendants did not at that time purchase and buy said fifty shares of stock" for the amount stated, but "on January 3, 1920, did buy said fifty shares of said stock for the sum of $350;" that on March 15, 1920, plaintiff directed defendants to buy for her one hundred shares of the stock of Libby, McNeill & Libby, and defendants pretended and reported to her they had bought the same for $2796.25, which amount she paid them; that in fact they did not buy said shares of stock for her at the time nor for the price they claimed to have bought the same, but bought fifty shares of

said stock on November 26, 1921, for $337.50, and the other fifty shares on December 15, 1921, for $287.50; that plaintiff did not learn the facts regarding the amounts paid by defendants for such stock until January 2, 1922, whereupon she demanded that defendants repay her the amounts so overpaid, but they refused to do so; that plaintiff also paid to defendants certain other specified sums amounting to $148.98 for alleged interest and commissions on loans, when in truth defendants made no loans for the plaintiff.

The affidavit of merits denies that defendants ever "transacted any business for the plaintiff," but says that the transactions mentioned in plaintiff's statement of claim were all had between them and Frederick C. Proctor; that at his direction and for his account, on October 26, 1919, they purchased upon the New York stock exchange the fifty shares of railroad stock therein mentioned and charged the exact cost of the same, with the broker's commission, to the account of said Frederick C. Proctor; that on March 15, 1920, they purchased upon the Chicago stock exchange, the other shares of stock therein mentioned and charged the exact cost of the same, with commissions, to his account; that the commissions charged were the usual charges and were reasonable; that the only interest charged was for advances made by them at current rates on stock exchange transactions; and that they furnished to said Proctor correct monthly statements of account which were received by him without objection.

Upon the trial, the plaintiff testified, in substance, that about September 1, 1919, she called at the defendants' office and spoke to one of the salesmen there about opening an account on margin; that the salesman said defendants did not take a woman's account and they would prefer to have her trade

in the name of some man; that she went again to defendants' office in October with her husband, Frederick C. Proctor, and was introduced to one of the firm; that she asked him: "Have you any objections to my trading in my husband's name?" and he said "None whatever," whereupon she gave an order for a hundred shares of "Southern Pacific" and afterwards for fifty shares of "Minneapolis & St. Louis;" that when she gave the last order she also left with defendants fifty shares of the same stock "as collateral;" that later she made other purchases of stock in like manner, made payments to defendants and received from them monthly statements of account, which were offered in evidence and which show charges to the account of Frederick C. Proctor for amounts paid for several hundred shares of various stocks between October, 1919, and July 15, 1920, including those above mentioned, and payments on account from time to time, with a small balance due to defendants on July 31, 1920, which balance remains the same until September 30, 1920, at which time the account was "long 100 M. & St. L., 200 Libby, 100 Orpheum;" that for over a year thereafter, the monthly balance was in favor of Proctor; that in September, 1920, she went to defendants' office one afternoon about four o'clock, where she spoke to a man "in a glass cage," that she gave him her name and asked for her stocks, describing the same, that the man "went away from the cage and he came back and said I had better come back the next day or some time later, that he did not have anything there for me then except Orpheum;" that she replied that she would come back, but she did not go back for a year, and when she did, she saw the same person, who repeated his former statement, viz: "I have nothing here but Orpheum, but you come back tomorrow and I'll have it all for you;"

that she called again a few days before Christmas (1921) and received certificates for part of the shares, and later received certificates for the remainder. She also testified that when the certificates of stock were thus delivered to her they were accompanied by "delivery memoranda," which were introduced in evidence. These memoranda purport to show that defendants bought fifty shares of "Libby" on November 26, 1921, for $337.50, fifty shares more on December 15, 1921, for $387.50, and one hundred shares of Minneapolis & St. Louis stock on January 3, 1922, for $500.

This was all the evidence offered on behalf of the plaintiff. A motion to direct a verdict for the defendants was made at the close of the plaintiff's case, which was denied. Defendants then proved by oral and documentary evidence that they did in fact purchase the exact number of shares of stock specified in the plaintiff's statement of claim at the time they received the orders to buy the same, and paid for the same the exact prices charged in the monthly statements of account that were rendered. This evidence of the defendants was not contradicted, unless plaintiff's evidence, above stated, can be considered as a contradiction.

During the hearing of defendants' evidence, it appeared that charges had been made against the account of Frederick C. Proctor for interest on the amount of the stock purchased from the date such purchases were ordered, although in fact the certificates for the stock purchased were not delivered to defendants and paid for by them until a few days (in one case ten days) later. Thereupon defendants tendered to the plaintiff in open court the sum of $40 to cover such overcharges for interest, and asked the court to direct a verdict in favor of the plaintiff for $40, which was done.

Plaintiff's counsel contend that three disputed questions of fact were presented by the evidence, viz: (1) Did the defendants accept an order from and deal with the plaintiff, as claimed by her? (2) Did the defendants pretend to buy the stocks ordered and when called upon to deliver go into the market and buy the stock at a lower price than that charged the plaintiff? (3) Did defendants obtain from the plaintiff, under the guise of interest, money to which they were not entitled?

As to the first of these questions, there was a dispute between the plaintiff and the defendant Coyle, as to whether the plaintiff, or her husband, gave the orders and made the payments in question. But by making the tender and asking for a verdict in favor of the plaintiff for the amount tendered, the defendants waived any question there may have been upon that point and virtually conceded that the transactions in question were with the plaintiff, although in the name of her husband. Therefore, it was unnecessary to submit that question to the jury.

The answer to the third question depends upon the answer to the second, that is, if it be true, as the defendants claim, that they actually purchased the stocks ordered by the plaintiff at the times such orders were given and that they paid for the same the amounts charged in the statements of account, then there was no overcharge for interest except for a few days, which is covered by the amount tendered, and for which the verdict was directed in plaintiff's favor.

The second question, therefore, was the real question in dispute at the close of all the evidence. Upon that question, plaintiff's counsel invokes the rule that on a motion to direct a verdict the evidence is not weighed, but the evidence in favor of the party against whom the motion is directed must be con-

sidered in the light most favorable to such party, including all inferences which can be legitimately drawn therefrom. (O'Leary v. C. C. Ry. Co. 238 Ill. 187.) The rule is a familiar one and well established. (Libby v. Cook, 222 Ill. 306.) Its application however to the facts of this case is not so clear. There is no direct testimony to the effect that the stocks ordered and paid for by the plaintiff in October, 1919, and March, 1920, were not in fact purchased by defendants at the times the orders were given. All defendants' evidence is to the contrary. But plaintiff's counsel contend that the evidence of the plaintiff gives rise to a reasonable inference that the stocks in question were never in fact purchased and paid for by defendants at the times they were ordered, but were merely charged to plaintiff's account as if so purchased, and were not in fact purchased until plaintiff demanded the delivery of the stock certificates. The only fact or circumstance related by plaintiff from which such an inference could possibly be drawn is the statement that she was twice asked by defendant to "come again" when she asked for her stock certificates. That fact, however, if true, proves nothing more than that when she demanded the delivery of the stocks, the certificates were not instantly available. When she made her first demand, she was asked to return the next day because only the Orpheum stock was "there" then. The ordinary meaning of this statement was that the certificates were locked up somewhere outside of that office and would be ready for delivery when called for the next day or later. Plaintiff said she did not return for a year, and then she was again told to come back the next day, and the next time she called, she received from defendants certificates for some of the stock and received the remaining certificates soon after. The only fair and reasonable inference that can be drawn from her

statement of what occurred when she made her second demand is, again, that the certificates were not where they could be physically delivered at that moment. There is nothing in these facts inconsistent with the facts proved by defendants.

Nor does the fact that the "delivery memoranda" furnished to the plaintiff with the stock certificates appear to show that the stocks were purchased only a short time before they were delivered give rise to any reasonable or probable inference that defendants did not in fact buy and pay for the stocks ordered by plaintiff at the times they claim to have bought them. If the delivery memoranda be considered without the explanation made by defendants it might be legitimately inferred therefrom that defendants had sold the stocks they had bought the year before and were therefore obliged to go into the market in November and December, 1921, and January, 1922, to buy other shares to be delivered to the plaintiff. That, however, is not the theory of the plaintiff's cause of action, as set forth in her statement of claim; and if it were, the plaintiff must fail, because in cases where a broker makes an unauthorized sale of the stock of his principal, the measure of damages is the difference between the amount obtained by the broker upon such sale and the market value of the stocks at the time of the plaintiff's demand (Brewster v. Van Liew, 119 Ill. 554); and there is no evidence of either. (See also Hahn v. Bruce, 95 N. Y. Supp. 1040.)

We conclude, therefore, that in any view that may be taken of the evidence, there was no evidence before the jury, at the time the verdict was directed, tending to prove the plaintiff's cause of action as alleged in her statement of claim, except as to the amount of $40, or less, for an overcharge of interest. The direction of the court to return a verdict for

the plaintiff for that amount was therefore equivalent to a direction to find a verdict for the defendant as to all of the amount claimed in excess of that amount, and was properly given.

The judgment is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

41 - 29444

FRED THOMA,
Defendant in Error,

vs.

FRED W. GREEN,
Plaintiff in Error.

237 I.A. 625

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

In December, 1921, a judgment by default was entered against defendant in the Superior court for $7896 upon personal service in an attachment suit. Eighteen months later, he sued out a writ of error in this court, and on March 11, 1924, the judgment was reversed and the cause remanded because the judgment was erroneous in two particulars mentioned in the opinion filed in that case (No. 28715). The first error as mentioned was that the affidavit for attachment was defective in that it did not state the place of residence of the defendant's, if known, or if unknown, that "upon diligent inquiry the affiant has not been able to ascertain the same," as required by section 2 of the Attachment Act. The second error was that the amount of the judgment exceeded the amount claimed to be due.

While that writ of error was pending here, an order was entered in the Superior court on November 21, 1923, "nunc pro tunc as of the 9th day of June, 1921" (which is the date of the jurat upon the attachment affidavit and one day before the latter was filed), in which, after reciting that "by mistake of the clerk" the judgment of December 13, 1921, was entered for $7896, when it "should only have been entered" for $7436,

and that "by mistake, plaintiff failed to fill out the blanks in the printed form of attachment affidavit" so as to show the residence of the defendant, whose address "was written on the back of the writ of attachment," it was ordered that the judgment "be and the same is hereby corrected to read for the sum of $7436, and the clerk is directed to correct said judgment," and that plaintiff "have leave to amend and correct the affidavit for attachment herein filed upon its face by adding thereto the residence of the defendant." Later, during the same term, defendant caused a motion to vacate this order to be entered and continued until the disposition of the writ of error then pending in this court.

After the order reversing the judgment and remanding the cause was filed in the trial court, defendant renewed his motion to set aside the order last mentioned. At the same time, he moved to quash the attachment writ because of the defective affidavit. Both motions were denied upon the theory, as stated by the trial judge, that the attachment was not directly attacked by the writ of error in No. 28715, and that this court "had not reversed the case for the reason of error assigned pertaining to the attachment issue, but simply on account of the excessive amount of damages." As hereafter shown, this theory is not in accord with the views expressed by this court in the opinion filed in that case.

Defendant then moved to vacate the default entered against him in December, 1921, and asked leave to file pleas admitting liability for part of plaintiff's claim, but denying liability for the remainder, submitting, with such pleas, his own affidavit and the affidavits of four other persons tending to support the pleas. Two of such affidavits also alleged facts tending to prove that after the service of the attachment writ

upon the defendant, plaintiff and his counsel made statements and promises which led him to believe that no further action would be taken against him in that suit. This motion was denied. Then defendant asked that plaintiff be required to prove his damages by the evidence of witnesses, so that defendant might cross-examine them as to the amount of damages. This was also denied.

The record shows that thereupon, without any trial or the hearing of any evidence but in supposed "accordance with the mandate and opinion of the Appellate court," the trial court entered a second judgment (or third, if the order of November 21, 1923, was of any effect) "nunc pro tunc as of December 18th, 1921" for $7436 with a special execution against the property attached, as well as a general execution. From that judgment, defendant prosecutes this writ of error.

The trial court was in error in stating, or assuming, that the attachment proceedings were not directly attacked by the first writ of error and that the first judgment was not reversed "by reason of error assigned pertaining to the attachment issue." The first writ of error was a direct attack upon the attachment, as well as upon the amount of the judgment. In the opinion filed in that case, it is expressly stated that "the errors assigned question the sufficiency of the attachment affidavit," that such affidavit was "undeniably defective," that it was "amendable," however, "by Section 38 of the Attachment Act," and hence "was voidable merely and not void," that "to the extent, therefore, that the judgment in this case 'sustains the attachment issue' it is not void, but it is erroneous," and that "for the errors indicated," the judgment is reversed and the cause remanded. There is no ambiguity in these expressions. They show not only that the attachment proceedings were directly attacked, but that the judgment was

reversed because it erroneously sustained the attachment, as well as because it exceeded the ad damnum.

When, therefore, the case was redocketed in the trial court, there was no judgment and no affidavit on file which was sufficient to sustain the attachment. In that condition of the record, it was clearly error for the trial court to deny defendant's motion to quash the attachment. While section 38 of the Attachment Act provides that no writ of attachment shall be quashed on account of any insufficiency of the affidavit, if the plaintiff shall cause a sufficient affidavit to be filed, the plaintiff in this case did not cause such an affidavit to be filed.

Plaintiff's counsel insist that the affidavit was properly amended on November 21, 1923, "by adding thereto the residence of the defendant" in pursuance of the purported authority given by the order of that date. There is nothing in the record before us to show that such is the fact. But if such amendment was in fact made on the face of the affidavit, according to the leave given by that order, we have no hesitation in holding that the order was absolutely void and conferred no authority whatever upon the plaintiff to amend the affidavit, nor upon the court to act upon an affidavit so amended. The order was entered nearly two years after the judgment was rendered, at a time when the superior court had no jurisdiction to make any order of that character. The defect in the affidavit was not such an error of fact as could be cured by motion in the nature of a writ of error coram nobis. It was an error apparent upon the face of the affidavit - not an error of the court or of the clerk, but, as the order states, a "mistake of the plaintiff in failing to fill out the blanks in the printed form." That "mistake" made the judgment erroneous so far as the attachment is concerned, and such an error can be corrected, after the judgment term has expired, only by a court of review.

As the attempted amendment of the attachment affidavit (if any was made) was unauthorized and void, and as the affidavit was not otherwise amended or corrected, it follows, we think, that the trial court erred in denying defendant's motions to vacate the order of November 21, 1923, and to quash the attachment.

We are also of the opinion that it was error for the court to deny defendant's motion to vacate the default and for leave to plead to the merits. We think the affidavits filed in support of that motion were sufficient, prima facie at least, to show a meritorious defense to all over $1300 and interest of the plaintiff's claim and reasonable diligence in making the motion, in view of all the circumstances therein stated.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

62 - 29467

MARTIN J. FUNK, Administrator of Estate of Albert E. Funk, Deceased, Plaintiff in Error,

vs.

RATLEDGE-BOKE CONSTRUCTION COMPANY, Defendant in Error.

237 I.A. 625

ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

From a verdict and judgment in favor of the defendant, the plaintiff brings this writ of error, contending that the verdict is manifestly contrary to the weight of the evidence and that reversible error was committed in giving the instructions.

We have carefully examined the evidence in the record in the light of the arguments of counsel, and are not prepared to say that the verdict is manifestly against the weight of the evidence. There is a sharp conflict in the evidence upon vital questions. It was therefore essential that the instructions given should be free from prejudicial error. We have reached the conclusion that at least one of the instructions is so inaccurate and misleading that the judgment must be reversed on that account. In stating the reasons for our conclusion we shall refrain from discussing the evidence further than is necessary to show the prejudicial character of such instruction.

The evidence on behalf of the plaintiff tends to prove that on Lincoln's birthday, 1923, at 8:30 o'clock a. m., the plaintiff's intestate, a boy five years old, and his brother, eight years of age, were crossing Irving Park boulevard, between Tripp avenue and Keeler avenue, in Chicago; that they were on

their way from their home, a block north of the boulevard, to a church-school which is several blocks southeast; that they were in the habit of going to school together, and for a year and a half had crossed the boulevard twice a day in going to and coming from school; that at the time mentioned they walked out of a north and south alley which intersects the boulevard one hundred and sixty-two feet east of Tripp avenue, and walked directly south across the boulevard towards the continuation of the same alley on the south side; that the boulevard - which runs east and west - is one hundred feet wide, with a roadway of fifty-seven feet, in the center of which are double street-car tracks; that there was very little traffic at that time; that the elder boy held his little brother by the hand, and as they passed the north curb line he saw defendant's heavy truck coming east in the south street-car track; that the truck was then about at Tripp avenue and appeared to him to be coming "not so very fast," and they walked on; that as the younger boy stepped on the north rail of the south track, he fell to the ground and was helped to his feet by the elder brother, who then saw the truck so near him that he jumped backwards, but the truck hit the smaller boy and ran over him.

The evidence of defendant's driver is to the effect that he drove defendant's truck eastward along the south track at a speed of ten or eleven miles an hour; that he did not see the boys until they appeared in the north street-car track immediately after an automobile, going west on that track, had passed him; that they were then less than eight feet from the front of his truck; that he shouted to them and the smaller boy started to run south directly in front of his car; that he applied his brakes and the truck stopped in a little more than

its own length. The driver is the only witness who testified to seeing an automobile pass at that time.

On behalf of the defendant, the court gave the following instruction to the jury:

> "17. You are instructed that if you believe from the evidence, under the instructions of the court, that the deceased, at the time of his injury, because of his immaturity, as you find it from the evidence, required the care and foresight of some person older and more experienced than the brother in whose charge he was placed at the time and place aforesaid, in order, in the exercise of ordinary care, to insure his personal safety, and further, that at the time of the injury reasonable care and foresight were not exercised by the parent of the deceased, and that such want of reasonable care contributed directly to the injury, then your verdict must be in defendant's favor and against the plaintiff."

A parent's duty in a case of this character is to use reasonable care to provide for the safety of his child in crossing a public street. Such reasonable care is that degree of care and caution which is ordinarily and usually exercised by reasonably prudent parents for the safety of their children under like circumstances. (C. & A. R. R. Co. v. Becker, 84 Ill. 483). The instruction quoted places a much higher duty and responsibility upon a parent. It implies that the duty of the father of the deceased boy required him to use "ordinary care to insure" his child's personal safety; and it states, in substance, that if the deceased "required the care of some person older and more experienced" than his older brother "in order to insure his personal safety," and that the father neglected this requirement and thereby "contributed directly to the injury," the verdict must be for the defendant. The plain meaning of this instruction is that even though the father of the deceased may have exercised the same degree of care for his son's safety that is ordinarily exercised by reasonably prudent fathers under like circumstances, in entrusting the care of his younger son to an older brother who had taken him safely across the same street

many times before the time of the accident, still the father might be guilty of contributory negligence such as to prevent a recovery if the jury believed from the evidence that in order to insure the child's safety, it was necessary that the child should have had the care and foresight of some person "older and more experienced" than his brother. We know of no authority for such a proposition. In the case of True & True Co. v. Soda, 201 Ill. 415, where a somewhat similar instruction was given, there was a verdict in favor of the plaintiff and the court referred to the instruction merely to show that the defendant had no good reason to complain of the manner in which the question of the mother's alleged negligence had been submitted to the jury. The plaintiff did not there object to the instruction, and the defendant could not. No question appears to have been raised in that case as to its effect, if any, upon the plaintiff's case. We regard the instruction given in this case as not only inaccurate, but misleading and suggestive as well. No other instruction was given on the same point. In our opinion, it was reversible error to give it.

Several other instructions are complained of. As the case must be reversed for the error mentioned, we deem it sufficient to say, as to such other instructions, that we think that instructions numbered 8, 11, and 12, are justly open to some of the criticisms enumerated by plaintiff's counsel and should not have been given without modification.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

74 - 29479

FRANK J. SMITHIE,
Appellee,

vs.

MACK-INTERNATIONAL MOTOR
TRUCK CORPORATION,
Appellant.

237 I.A. 625

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in plaintiff's favor for $300, which he claims he paid to defendant under duress. Defendant claims the proof does not show any duress, but shows a voluntary payment.

On December 15, 1928, plaintiff bought a truck of defendant for $6000. He paid $2000 down and gave his notes for the balance, secured by a chattel mortgage on the truck. The notes were payable monthly. The first eleven were for $400 each, and the twelfth was for $1600. Plaintiff paid the first three notes when due, or soon after. The fourth note was due December 2, 1929. Whether this was paid in that month is the main question in dispute.

Plaintiff testified that on December 15, 1929, he gave his check to defendant for $299.32 - the odd amount being for interest - and that a day or two later he paid defendant's manager in cash the remaining $300 then due on that note, and that defendant sent him the cancelled note in a letter dated December 22, 1929, which was produced on the trial and admitted in evidence. Defendant denies receiving the cash payment and claims that the letter returning the cancelled note was a mistake.

The note that was due in January, 1921, was not paid when due, and at defendant's suggestion plaintiff left the truck in defendant's possession until the following July, when a new mortgage was given securing a new series of notes, the first six of which were payable at the rate of $300 a month. The amount of these notes, aggregating $4910.27, was fixed by defendant on its theory that the cash payment of $300 had not been made in December, as claimed by the plaintiff. Plaintiff testified that before he signed these notes and the mortgage securing the same, he protested that he did not owe $300 of the amount included in the mortgage because of his payment of that amount in December, and that his protest was met with the statement on the part of defendant's manager that "if you don't sign that mortgage up, you can't get your truck." He also testified that later another series of notes, secured by a third mortgage, was given under like circumstances. Defendant's manager denies these alleged protests. Eventually, all the notes were paid and the mortgages released. Then plaintiff brought this suit to recover the amount of the alleged overpayment.

It is a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person paying the same, cannot be recovered back on the ground that the claim was illegal (Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535); but it is equally true, as is shown by the opinion in the case cited, that if the payment is made under the pressure of compelling business necessity amounting to duress, the rule is otherwise. (Chicago & Alton R.R. Co. v. Chicago V. & W. Coal Co., 79 Ill. 121; Pemberton v. Williams, 87 Ill. 15; Spaids v. Barrett, 57 Ill. 289; Chicago & E. I. Ry. Co. v. Miller,

309 Ill. 297; Brickett v. Madison County, 14 Brad. 484.) In the case last cited it is said: "Where by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make payment of money which indeed he does not owe and which in equity and good conscience the receiver ought not to retain, he may recover it." We think this is an accurate statement of the existing rule applicable to claims like that of the plaintiff.

Such being the rule, we think the court did not err in instructing the jury that the real issue for their determination was whether the $200 payment had been made as was claimed by the plaintiff. Upon that issue plaintiff's testimony is corroborated by the return to him of the cancelled note in a letter from the defendant dated only a few days after the plaintiff claims he made the payment. The claim of defendant that this was a mistake is improbable and is not supported by anything except the bare denial of defendant's manager that he received the money.

Defendant's counsel apparently claim that the questions of fact involved regarding the alleged duress were not submitted to the jury. The record shows that the jury was instructed orally as above stated. No objection was then made by defendant that this was not the only issue presented for the determination of the jury. The only objection made to the instructions at the time they were given was that the plaintiff was "a mortgagor in default" and was therefore "not entitled to possession" of his truck "even if he makes a tender of the amount due." The question was not one of tender, but of payment. Moreover, if defendant desired instructions to be given on the point suggested, it should have requested the same, and we find nothing in the record to show

that defendant tendered or requested any instructions upon that point, either orally or in writing.

The judgment is affirmed.

AFFIRMED.

Gridley, J., concurs.

93 - 29502

237 I.A. 625

CHARLES ANDREWS, doing business as Andrews Realty Co., Appellant, vs. GEORGE R. HAPPE, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is a suit by a real estate broker, brought to recover commissions upon the sale of real estate. There was a trial before the court without a jury resulting in a judgment against the plaintiff, and he appeals.

The essential facts are uncontradicted. Defendant was the owner of an apartment building in Chicago. Plaintiff was a real estate broker and had in his employ a salesman named Frisa. Frisa called on defendant in April, 1923, gave him plaintiff's business card, and they had a talk regarding the sale of defendant's building. Frisa was given all the details concerning the property, including the number and size of the different apartments, the rental of each, the total annual rental, and the amount of the first and second mortgages. Defendant told Frisa he wanted $190,000 for the property and would pay a commission on that amount, and gave him permission to examine the building. Frisa submitted the property to one Margolis and at some time during the month of May showed him through the building. Soon after, Andrews, Frisa, Margolis and a friend of the latter went to defendant's office, where Frisa introduced the plaintiff and Margolis to the defendant. Margolis offered defendant $180,000 for his property.

The defendant refused the offer, saying his price was $190,000 "and I pay the commission." Plaintiff asked Margolis to "give five thousand dollars more," but Margolis refused. Plaintiff, the salesman and Margolis then left defendant's office but stopped outside and had a discussion. Plaintiff returned alone and urged defendant to accept Margolis' offer. Defendant refused and then plaintiff asked: "What is the best price you can make?" to which defendant replied: "You had better talk it over and come in and see me." The salesman saw defendant once more during the month of May but defendant said his best price was $190,000 and told the salesman that another broker had made a better offer than $180,000 "with one-half commission." After that, plaintiff and his salesman made further efforts to bring the parties together, but defendant stood by his price and Margolis refused to make a higher offer. On July 5 plaintiff said to defendant: "I have the same man and the same offer," to which defendant said: "I want to be able to do business with you." On July 15 plaintiff again saw the defendant and again urged him to accept the offer of Margolis, but was then informed that defendant had sold the building, receiving $20,000 cash and a six-flat building. No such sale or trade was in fact made, but five days later, (July 20, 1923) defendant entered into a written contract with Margolis by which he agreed to sell the property to Margolis for $180,000, and the sale was closed on August 3, 1923, without the knowledge of either the plaintiff or his salesman. A few days later, Friss asked defendant: "How about our commission?" Defendant replied: "No commission; I sold building for $180,000 net." On the trial, defendant introduced evidence tending to prove that Margolis had seen the property before Friss called his attention to it, and had authorized his lawyer to make an offer of $175,000, which had been declined.

In support of the judgment of the trial court defendant invokes the rule that where an owner authorizes a broker to sell his property at a fixed price and upon certain terms, the broker must produce a purchaser able and willing to buy at that price and upon those terms before he is entitled to a commission. (Gaus v. Sprunger, 45 Ill. 308; Oliver v. Sattler, 233 Ill. 536; Kilgore v. Mason, 138 Ill. 304.) That such is the rule is not questioned. But it is also quite as well established that where the broker had produced a customer and continues negotiations which are carried on to a final sale, he cannot be deprived of his right to commissions merely because the owner completes the negotiations himself or through another party, even though the sale is finally concluded for a different price, or upon other terms, than were given to the broker. (Rinden v. Moore, 226 Ill. 382; Hafner v. Herren, 165 Ill. 242, 251; Henry v. Stewart, 165 Ill. 448; Wright v. McClintock, 136 Ill. App. 430; Reynds et al. v. Victoria Hotel Co., 184 Ill. App. 500; Francisco v. Coleman, 230 Ill. App. 465.)

We are of the opinion that the facts of this case bring it within the rule last stated, instead of the rule invoked by defendant. It is clear from the evidence that plaintiff produced a purchaser for defendant's property and introduced such purchaser to the defendant and induced the purchaser to make an offer to defendant of an amount - $180,000 - for which the defendant eventually sold his property to such purchaser. Under such circumstances, the authorities above cited hold that the broker is entitled to his commission.

It is said, however, by defendant's counsel, that defendant severed all relations with the plaintiff on July 5, "when he told the plaintiff he would be unable to do business with him." The record shows that defendant made this remark to the plaintiff after plaintiff had said to defendant: "I

have the same man and the same offer;" and the record further shows not only that ten days later plaintiff again tried to induce defendant to accept Margolis' offer, but that fifteen days after defendant made the remark quoted, he signed a written contract showing that he had been able to "do business with" Margolis, and had, in fact, accepted the offer which plaintiff had induced Margolis to make.

It is also claimed by defendant's counsel that no employment of the plaintiff was shown. The contention is wholly without merit. The defendant himself testified that he "listed" the property with the plaintiff and gave him the price and the terms of sale. His testimony agrees with that of the plaintiff and the plaintiff's salesman as to the repeated efforts made by them to bring about a sale to Margolis. The employment was shown beyond question. Moreover, under the circumstances shown by the evidence, we think he cannot be heard to deny that plaintiff was employed to find a purchaser for his property. (Knotts v. L. E. & M. S. Ry. Co., 172 Ill. App. 530.)

It is finally claimed by defendant's counsel that there were others who were endeavoring to sell defendant's building at the same time, and it is sought to bring the facts of this case under the rule that where an owner employs more than one broker, the one who actually brings about the consummation of the sale is the one entitled to the commission. No such case is made by the proof. The only fact or circumstance appearing from the evidence which tends to show that any other person was endeavoring to sell the defendant's property is the evidence that one Muffett had induced Margolis to make an offer of $175,000 for the property. The record shows, however, that Muffett was Margolis' attorney, and that the offer made through Muffett was refused before plaintiff began his efforts to sell the property. There is not the slightest evidence that Muffett "consummated" the

sale beyond the mere fact that he was present as Margolis' attorney when the contract was made. The rule invoked has absolutely no application to the facts of this case.

For the reasons stated, the judgment of the Municipal court is reversed. As the case was tried before the court without a jury, the cause will not be remanded, but judgment will be entered in this court in favor of the plaintiff and against the defendant for the sum of $5400, the amount shown by the evidence, without contradiction, to be the usual and customary commission in like cases at the time the services were performed.

REVERSED AND JUDGMENT MADE FOR $5400.

Barnes and Gridley, JJ., concur.

93 - 29502

FINDING OF FACTS.

The court finds that defendant authorized and employed the plaintiff, a duly licensed real estate broker, to find a purchaser for defendant's property described in the plaintiff's statement of claim at a price of $150,000; that plaintiff introduced a purchaser to the defendant who offered the latter $180,000, which offer was accepted by defendant and the property was sold to such purchaser for that amount; that plaintiff was the efficient and procuring cause of such sale and from the time the offer was made until the sale was consummated plaintiff did not cease his efforts to effect the sale, nor did the purchaser during that time abandon his intention to buy at the price offered; that the usual and customary charge for such services as were rendered by plaintiff is three per cent of the purchase price, amounting to $5400.

110 - 29619

237 I.A. 626

WALKER S. TACKETT,
Appellee,

vs.

WARD H. JONES et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Ward H. Jones, J. H. Jones and Orien J. Hamilton, "individually or as copartners under the name and style of Ward H. Jones Mfg. Co.," for money had and received. After a non-jury trial, the court said, according to the stenographic report: "The attachment is quashed. Dismiss as to Hamilton and judgment against the two Joneses." The common law record states that at the conclusion of the trial, the court made the following finding: "The court finds the issues against the plaintiff as to defendant Orion J. Hamilton, and against the plaintiff as to attachment, and against defendants Ward H. Jones and J. H. Jones as to merits, and assesses the plaintiff's damages at the sum of Four Thousand and no/100 ($4000.00) Dollars." The common law record does not show any judgment on said finding as to Hamilton, but does show a formal judgment against the two Joneses for $4000.

On this appeal, the latter contend (1) that the judgment should have been against all or none of the defendants; (2) that the finding and judgment against Ward H. Jones was wrong on the merits, and (3) that the evidence does not sustain the judgment against J. H. Jones.

Most of the argument of counsel is directed to the first point. On account of the apparent discrepancy above

noted between the record of the judgment and the judgment as pronounced by the court, as recited in the bill of exceptions, it is uncertain whether Hamilton was dismissed out of the case or ceased to be a defendant upon the finding of the court. We do not find it necessary, however, to decide the controversy between counsel as to the effect of this uncertainty in the record before us, for the reason that we have come to the conclusion that the third point is well taken and of itself necessitates a reversal of the judgment.

On December 27, 1923, plaintiff had just become of age. He had some bonds and an interest in an estate from which he expected $25,000. He knew Ward H. Jones, who was two years older, and who had begun the manufacture of automobile bumpers less than a year before, under the name and style of Ward H. Jones Mfg. Co. Plaintiff testified that Ward Jones said he was doing a fine business; that he had invested $25,000 of his own money and that his father, J. H. Jones, had invested $50,000; that "they were reincorporating for $300,000, and the papers were in Springfield;" that plaintiff then said he would "like to get in" but that "his estate wasn't settled yet and he only had $4000 on hand," but would like to work for Jones a while "to see whether he liked it or not," and that Jones then agreed to pay him $275 a month and he agreed to put up $4000 in bonds for a month as evidence of his "good faith."

On December 31, 1923, plaintiff delivered that amount of bonds to Ward Jones, who gave him a receipt signed by himself and reading as follows: "This is to acknowledge the receipt of $4000 of Mr. Walker Tackett, which is to be a portion of his investment in the Ward H. Jones Mfg. Co., for which he will receive proper compensation at a later date." Ward Jones

cashed the bonds at his bank on the same day, while plaintiff was waiting outside in an automobile.

Plaintiff claims that Ward Jones told him he "could have his money back any time he wanted it," but that when he demanded it back on January 6 or 7, 1924, he was offered Ward Jones' check, which he refused.

Plaintiff further testified that the first time he had any talk with J. H. Jones was at the latter's home two days after the bonds had been delivered to Ward Jones, and that the father then said he "was controlling the company" and would protect plaintiff's interest "as much as he would his own son's."

J. H. Jones denied making this statement, and in this denial he is corroborated by his son and daughter, as well as his wife, whose testimony was admitted over objection. All of these were present on the occasion referred to. He also denied that he had any interest whatever in the Ward H. Jones Mfg. Co., and denied that he had ever received any salary or profit from it, or had invested any money in the business of that company, or had any written agreement with regard to the company between himself and his son. He freely admitted, however, that he had loaned his son approximately $25,000, from time to time, in amounts varying from $100 to $400 each, and there is evidence tending to prove that on one or two occasions some of the son's bills were paid by the father at the son's request. Such evidence is not of itself sufficient to prove the alleged partnership between the father and son, and there is nothing else in the evidence tending to prove the same except his alleged admission, made after plaintiff had delivered his bonds to Ward H. Jones. It appears from the evidence that the business of the Ward H. Jones Mfg. Co. was closed as the result of attachment suits brought in February, 1924, and the sole defendant in each suit is Ward H. Jones, "trading," or "doing business," as

Ward M. Jones Mfg. Co. Yet the plaintiff in one of such suits was one of the witnesses for the plaintiff in this case and testified that the father paid him one of the son's bills. After a study of the evidence in the record, we think the very slight evidence tending to prove the plaintiff's theory of a partnership existing between the father and son is not sufficient to overcome the positive evidence of both father and son upon that question, and are of the opinion that the finding of the court as to the defendant J. H. Jones is manifestly against the weight of the evidence. As to Ward M. Jones, however, a different question is presented. We are unable to say that as to him, individually, the finding is manifestly wrong.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

29430

29 - 29430

AUGUSTA J. GLENDINNING,
Defendant in Error,

vs.

WILLIAM G. PALMER and THOMAS DAVIS,
Plaintiffs in Error.

237 I.A. 626

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action of trespass for assault and battery and false imprisonment, joined with a count for malicious prosecution. The trial of the issues, formed by general and special pleas, resulted in a verdict against plaintiffs in error and for plaintiff assessing her damages at "one hundred thousand ($100,000) dollars as follows: Seventy-five thousand ($75,000) dollars actual damages, and twenty-five thousand ($25,000) dollars vindictive damages." Judgment in the form of the verdict was entered.

Plaintiff and her husband Robert Glendinning in November, 1919, lived at 4438 Greenwood avenue, Chicago. They had two children, a boy and a girl, eight and eleven years, respectively. Defendant Thomas Davis was a cousin of the husband and lived with the family. Defendant Palmer was also a cousin of the husband and was an intimate friend of the family, and employed by the Patent Vulcanite Roofing Company, of which plaintiff's husband was the president and largest owner of its stock. Following the sale of its assets in the previous month for about $4,000,000, plaintiff's husband suffered a nervous breakdown and in the latter part of November, 1919, went to the Garfield Park Hospital, where he died in the following February.

There was testimony tending to show that in the week after Thanksgiving, 1919, while her husband was at said hospital, plaintiff manifested symptoms of insanity as diagnosed by specialists in nervous and mental diseases. The family doctor had previously advised her to go to a sanitarium for a rest, and a nurse was in attendance for one of the children.

There was testimony that during that week, up to and including December 2, plaintiff threatened on three different occasions to kill her children, and on one occasion threatened suicide. One of her neighbors testified that she so threatened in a conversation with her over the telephone, and that she at once communicated the fact to the vice president of her husband's company. Defendant Palmer testified that she so threatened while he was calling at her home, and the nurse that she so threatened on the evening of December 2, after she had been examined at her home by Dr. Neymann, then psychiatrist in charge of the Psychopathic Hospital of Cook County.

Immediately after these threats and manifestations, which, as described, indicated a disordered state of mind, several successive conferences were had in which one or both of defendants Palmer and Davis participated. The first was between Palmer and the family physician, the next between defendants Palmer and Davis, the family physician, three friends of the husband, who were officers of the Vulcanite Roofing Company, and the former family pastor; the next on the same afternoon between said parties and Roger Sherman, the attorney for plaintiff's husband; the next on the same day between said defendants, said attorney, said family physician and Dr. Sanger Brown, an alienist, after which the attorney, the family physician and the two defendants went to see and had a talk with Judge Horner, then acting County Judge hearing insanity cases. The same

evening Dr. Neymann and the two defendants saw and conversed with plaintiff's husband at the hospital, and went to the Glendinning home where the doctor examined her. But the court refused to permit testimony that they talked with him, or made such visit at his request, on the mistaken theory that it was not admissible because he was her husband and dead. Nor would the court permit defendants in error even to show that such examination was also made on the judge's advice, or that they spoke to said attorney, or conferred with him, or what the judge said, or in fact anything that took place or was said at said conferences, upon the equally mistaken theory that the plaintiff was not present on such occasions.

After Dr. Neymann made an examination of plaintiff he signed and gave Palmer a certificate stating that he believed her to be insane. When they left there Davis drove Palmer to his home, and testified that from there he telephoned to the family physician, Dr. Neymann, the judge, and then Dr. Neymann again, all of which testimony the court erroneously struck out as immaterial.

After the second telephone conversation with Dr. Beymann defendants went to the Hyde Park police station, saw the officer in charge, and gave him the certificate from Dr. Beymann. From there they, the police matron, and one or two policemen drove back to the Glendinning home, where plaintiff was taken into custody by the police and driven to the Psychopathic Hospital in the patrol wagon. She remained there until December 13, 1913, when she was taken by defendants and said nurse, pursuant to her request, as claimed by them and denied by her, to Wauwatosa Sanitarium near Milwaukee, Wisconsin, a private sanitarium for the care of nervous and mental diseases. There she was examined by specialists,

Dr. Sleyster and Dr. Dewey, both of whom testified that she was then suffering from a form of insanity. She left this institution, (where she was apparently left free to go and come as she pleased) to go to the bedside of her husband who died before she reached there, and did not return to the institution. This suit is founded upon these incidents.

Having reached the conclusion that, regardless of any other grounds, the numerous rulings of the court upon the exclusion of evidence as above stated require a reversal of the judgment and remanding the cause for a new trial, and not being able to say that the court should have directed a verdict, as claimed by plaintiffs in error, it is unnecessary to review the evidence in detail, or to discuss its weight.

Upon principles of law too familiar to call for citation, it can hardly be questioned that the rejected evidence tended to disclose grounds, motives and advice upon which the defendants acted in the matters aforesaid, and, therefore, was relevant and material as tending to show probable cause, good faith, absence of malice, and justification for the alleged trespasses, all elements of a defense under one or more of the counts of the declaration.

These rulings and others of like character complained of are so numerous and scattered through a record of over 2000 pages, that to pass upon each would be more or less impracticable and would unnecessarily extend this opinion.

As the exclusion of such testimony erroneously deprived defendants of the opportunity to present much competent and material evidence tending to establish their defense, we shall not refer to remarks of the court complained of in ruling upon the evidence further than to state that they so far indicate impatience with defendants' witnesses and their defense, and

cast reflections upon some of them, as to be hurtful before a jury, and were seemingly reflected in a verdict for the full ad damnum of $100,000, a sum which, in our opinion, even plaintiff's evidence alone would not justify. Furthermore, the court improperly stated in one instance that he did not believe what one of the witnesses said, and in another instance expressed his opinion on the weight of the evidence. Altogether such remarks disclosed prejudicial antagonism by the court against the defense and their witnesses that could not have escaped the attention of the jury, and probably affected their verdict. In these respects we do not think defendants had a fair trial, to which they were entitled even if guilty, as has been frequently said by the Supreme Court.

We think the court also improperly excluded evidence tending to show that in the past plaintiff had been insane and a drug addict, and that these facts were known to the defendants, also in refusing to admit evidence that one of the defendants sent a letter to a brother of plaintiff notifying him of plaintiff's condition.

Complaint is also made of the admission in evidence of copies of deeds from plaintiff and her husband to defendant Davis which were then the subject of litigation. In view of a decision of this court settling the questions involved in Davis' favor, these deeds will probably not be offered on another trial.

Complaint is also made of the admission of certificates of stock and evidence purporting to show a transfer thereof from the husband of plaintiff to defendant Palmer and the value of the stock which appear to be now the subject of litigation between plaintiff and defendant Palmer. We will not now say that the best evidence relating thereto might not be admissible on hearing

motive.

Complaint is also properly made, we think, of the admission of much evidence as immaterial, irrelevant and prejudicial, some relating to occurrences after defendant left Wauwatosa, some to occurrences long before plaintiff was placed under any restraint, some being testimony by the two children, some purely hearsay, and some allowing plaintiff to state her conclusions and feelings.

We shall not undertake to review these numerous complaints believing that they will not form the subject of controversy in another trial.

Because of the errors stated the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, J., concurs.

Fitch, P. J.:

I concur with the conclusion of the foregoing opinion but not in all that is said as to the refusal to admit some of the offered evidence.

83 - 29491

R. M. TASHJIAN,
Appellee,

vs.

R. M. TASHJIAN,
Appellant.

237 I.A. 626

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit upon a stated account tried before a jury. Appellant urges that the verdict was contrary to the law and the evidence, and that the court erred in permitting plaintiff to file an amended statement of claim after the verdict and before judgment.

It is undisputed that on July 23, 1923, the parties, who are brothers, met with two arbitrators to effect a settlement as to the amount due plaintiff in transactions between them extending over six years. After going over such checks, bills, books and documents as the parties produced before the arbitrators, the latter drew up a memorandum of the respective claims of the parties. There was no difference as to the amount paid by defendant. The difference was as to the number and value of rugs plaintiff had consigned to defendant, resulting in a difference of $816.80 between their respective claims.

At the bottom of the memorandum is the following: "I, the undersigned, agree to pay the amount claimed by R. M. Tashjian, as long as he has sworn it to be the truth." This was signed by the defendant and witnessed by the signatures of the two arbitrators. The memorandum shows the amount of plaintiff's claim at that time was $1560.85.

Appellant contends that his assent or admission to plaintiff's claim was upon the condition that the plaintiff

"swear to it," and that he did not do so, and that the delivery to him of the memorandum was not intended unless he did so "swear."

Defendant having claimed that he had discovered other credits to which he was entitled, plaintiff assented to another conference, had August 13, 1921. At that conference plaintiff claimed that the bills, checks, and books rechecked showed an additional indebtedness to him of $26.55, and there was no evidence to the contrary. Thereupon, claiming authority from defendant to do so, which defendant denies giving, plaintiff, in the absence of defendant, wrote into said memorandum: "August 13, 1921 - $1600.50 - found correct on recomputation."

The original statement of claim set forth these facts in substance and allowed defendant credit for $100 paid thereon in September, 1922.

The verdict being $1400.55 was evidently based on the theory of an agreed and stated account at the first conference, and allowed said credit. The amendment allowed by the court after verdict was made to conform with such finding, which there was evidence to support, and it was clearly within the power and discretion of the court so to do. (Sec. 1, Ch. 7, R. S. on Amendments and Jeofails, and Sec. 39, Ch. 110 on Practice.)

As to the sufficiency of the evidence we see no reason for disturbing the verdict and judgment. The testimony of plaintiff and the two arbitrators called as witnesses by him, together with the facts that defendant signed the memorandum admitting the plaintiff's claim, and seemingly recognized it as correct afterwards until he asked for a second conference, and that his signature to such admission was witnessed at the time by the two arbitrators, and the memorandum of the settlement handed to plaintiff, strongly tend to support the conclusion of an

agreement as to the amount due, and in our opinion preponderate over the mere naked denials of defendant and much testimony as he relies on by one of the arbitrators, indicating an uncertain recollection as to some details.

The parties are Armenians and seem to have conducted the conferences in the Armenian language, and defendant required that plaintiff "swear" to the correctness of his claim, - evidently in some form recognized as binding by Armenians, apparently consisting of turning his face to the east and "swearing" or affirming the account to be true. Plaintiff testified that he turned his face to the east and was about "to swear" when his brother "took his hand" and quoted Scripture against his doing so, whereupon plaintiff said to him he was swearing that his books and claim were right, and defendant then told one of the arbitrators to "take the paper and write it." Thereupon one of the arbitrators wrote down what is quoted from the memorandum aforesaid, and the same was then signed by defendant and the arbitrators. One of the arbitrators testified that defendant said: "If my brother swears that I owe him $1500 and some odd dollars I will accept." Thereupon he wrote down what is in the memorandum aforesaid and the defendant looked at it and signed it, saying: "I am going to sign if my brother swears." The other arbitrator testified that he was always under the impression that plaintiff "had sworn" and - as testified to without objection - that he was reminded by his wife that he had so told her on returning from the meeting.

There was also testimony that defendant offered the following year to pay plaintiff in settlement of the claim $1000 in rugs and $500 in cash.

Defendant's testimony consisted mainly of categorical denials. He denied he signed the agreement, that he owed his

brother any money, that he ever made any offer to pay him, as testified to by his brother, or that the $100 was paid on account, but admitted that he told his brother that if he would "swear" to the truth of the claim he would pay such amount, and did not testify that his brother did not "swear," nor did he attempt to give a version of the conference or explain why he signed the memorandum.

We find no occasion for disturbing the verdict and judgment in the case.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

91 - 29500

EDWARD I. BARTON,
Appellee,

vs.

ELIZABETH HUTT et al.,
Appellants.

237 I.A. 626

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered in a proceeding upon a writ of certiorari quashing the record of proceedings of the Civil Service Board of the West Park Commissioners, a municipal corporation, wherein said board ordered the dismissal of appellee from his position of chief electrician in the classified service of said corporation.

The board assigned as errors the quashing of the record and not quashing the writ; and appellee contends that the board was without jurisdiction because (1) the specific charges preferred do not constitute cause for his removal, and (2) there is no evidence in said record tending to prove the charges made.

It is not questioned that "cause" is a jurisdictional fact, and must affirmatively appear in the return of the writ. (Punkhouser v. Goffin, 221 Ill. App. 14, affirmed in 301 Ill. 257, and cases cited.) No question is raised here that there was a lack of jurisdiction in any other respect. The charges were in writing, and appellee received due notice of them and was given an opportunity to be heard before the board in compliance with section 12 of the Civil Service Act. (Ch. 24, par. 697, Cahill's R. S.)

The charges, which the Civil Service Board found as sustained, read as follows:

"General: I charge that you have violated paragraphs 10, 11 and 12 of section 3, Rule VII, of said Civil Service Board in that

"Specific: on or about the 6th day of September, A. D. 1923, at Sacramento & Franklin Blvds., two (2) reels of cable were reported stolen, and upon investigation, report shows that the cable had been missing from six to eight weeks and that no report of this missing cable had ever been made before the above date.

(Signed) Wm. G. Barclay,
Engineering Department."

The record shows that paragraph 10 reads:

"Is careless or negligent of the property of the park;"

that paragraph 11 reads:

"Has violated any lawful or reasonable official regulation or order or failed to obey any lawful or reasonable direction made or given by his superior officer, where such violation or failure amounted to an act of insubordination or a serious breach of proper discipline, or resulted or might reasonably have been expected to result in loss or injury to the park district, or to the public;"

that paragraph 12 reads:

"Is guilty of acts or omissions specifically charged and established which render his removal or discharge necessary or desirable for the economical or efficient conduct of the business of the park."

Paraphrasing the written charges in connection with said rules (knowledge of which appellee as an employe presumably had) the charges may be reasonably construed as including that appellee neglected or omitted to report the loss of park property for six or eight weeks after it disappeared. "That negligence and incompetency on the part of an officer in regard to some particular work which it has been his duty to do or supervise and look after, are causes for which the commission may properly allow a removal, cannot be seriously doubted." (Heaney v. City of Chicago, 117 Ill. App. 405.) Whether these charges constituted cause depends on whether there was proof of any facts tending to show that appellee had knowledge or was chargeable with knowledge of such loss, and whether it was his duty to report it.

The sufficiency of the testimony here on that point

was not a question for the court below to determine. (People v. City of Chicago, 234 Ill., 418.) Nor could it properly decide whether or not the Civil Service Board correctly decided questions arising upon the admission or exclusion of evidence. (People v. Lindblom, 182 Ill. 240.) But it may inspect the record to determine whether or not there was any evidence that reasonably tended to support the charges, for a quasi judicial tribunal of inferior jurisdiction must recite the facts, or preserve the facts themselves upon which its jurisdiction depends. (Funkhouser case, supra; Prezell v. Dick, 216 Ill. 98.) The nature of the charges here is such as require evidence of facts showing that a duty rested on appellee to report said loss.

Looking into the return we find testimony to this effect: That the cable in question was delivered to the electrical force of the electrical department, of which appellee was chief electrician, on instructions from the head of the engineering bureau, at a place within the park system, where it was to be used in the rehabilitation of the electric light system of the park by certain contractors then carrying on the work under the engineering bureau; that the delivery was made about March 15, 1923; that the contractors abandoned their contract in April following; that the work of rehabilitation was taken up "after the contractors left the job" by the electrical division of which appellee was chief; that the cable thus inferentially came under the custody and control of his department; and that it was missing some six or eight weeks before September 5 or 9, 1923, when he first reported its loss. The testimony, therefore, though meager, had a tendency to show appellee's constructive knowledge of the loss of the cable, his corresponding duty to report it to his superior officer, and his neglect or omission to do so.

Such facts appear mainly on cross-examination of appellee. Their sufficiency we do not pass on. Their tendency, however, is to support the charges.

As, therefore, an inspection of the record does not disclose a lack of jurisdiction on the part of the Civil Service Board to enter the order of removal the court erred in quashing its record and, therefore, its judgment will be reversed and the cause remanded with directions to quash the writ of certiorari.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch, P. J., and Gridley, J., concur.

RICHARD L. WILLIAMS,
Complainant and Appellee,

vs.

CHARLES S. WILLINGTON, Trustee,
et al.,
Defendants.

On Appeal of ALEXANDER W.
MARMOR,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

STATEMENT BY THE COURT. In a foreclosure suit, cause No. E-80913, the circuit court entered a decree, on December 13, 1923, confirming the master's report and finding that Richard L. Williams, complainant, is entitled to a foreclosure and has a first and prior lien on the premises for $47,697.80, interest and costs, less the net amount of rents collected by the Chicago Title & Trust Company, receiver, since December 30, 1921; that the proceeds of the sale up to said sum, less said rents, be applied, so far as they are sufficient, first, on an indebtedness of $45,000, together with interest, due from George J. Williams to complainant, and the surplus, if any, be turned over to Alexander W. Marmor; that Marmor is now the owner of the equity of redemption and that George J. Williams has no further right or title in the premises; that the receiver's report, showing a balance on hand of $12,904.71, up to November 22, 1923, be approved; and that within 3 days the receiver pay over to complainant said balance to apply on the indebtedness to him. The court decreed that, unless George J. Williams, or some of the defendants, within 5 days, pay the amount found due to complainant, together with interest and costs, including certain master's and solicitors' fees, less said balance, the premises be sold;

and further ordered that an appeal be allowed to George J. Williams to the Supreme Court of Illinois, from that portion of the decree finding that Harmer is now the owner of the equity of redemption, etc., but that such appeal should in no way affect the remainder of the decree, or the sale directed to be had, "except such additional portion which directs that the surplus of the proceeds of the sale * * be turned over to Alexander W. Harmer instead of George J. Williams."

On the day the decree was entered the court, by written orders, denied several motions made by Harmer, and he was allowed an appeal to this appellate court "from the decree and orders entered * * on December 13, 1923." His appeal was perfected and is the one now before us.

The appeal of George J. Williams to the Supreme Court also was perfected, and on December 16, 1924, the decree was affirmed as to him. (Williams v. Williston, 315 Ill. 178, 185.) From the opinion of the Supreme Court and the present transcript the following facts appear:

On May 28, 1914, George J. Williams, the then owner of the premises, executed his promissory note for $40,000 payable in five years after date to his own order and by him endorsed, with interest at 5% per annum, and, to secure its payment, he, with his wife, conveyed the premises by trust deed to Charles S. Williston, trustee. On September 15, 1914, Williams and wife conveyed the premises, subject to said trust deed, to Leo Marion, and received from him, as part of the purchase price, his eight notes, aggregating $7,500, and due, respectively, from one to eight years after date. The payment of these notes was secured by trust deed to said Williston, trustee, which became a second lien on the premises. Shortly thereafter Marion conveyed the premises to one Sulton,

and by ~~mesne~~ conveyances Samuel Meyerowitz acquired the title, subject to said two trust deeds, on October 28, 1918, when George J. Williams, because of default in payments due him, filed a bill to foreclose said second trust deed against Marion, Meyerowitz and others in said circuit court, cause No. B-47227. On the following day, upon notice, Richard L. Williams (complainant in the present cause and a nephew of George J. Williams) was appointed receiver of the premises in cause No. B-47227, and he took possession and collected the rents until September 28, 1920, after which date and until December 20, 1921, George J. Williams was in possession and actually collected the rents, although Richard L. Williams was not actually discharged as receiver until some time in February, 1921. The amended and supplemental bill of George J. Williams, seeking to foreclose said second trust deed, was filed on March 13, 1920. In this bill it is stated that the first trust deed (securing his note for $40,000, dated May 28, 1914) is a prior incumbrance, but it is not stated who is the owner of the note. The evidence, however, discloses that the note had been deposited by him with a Chicago bank, as collateral security for another note of his, and that on September 25, 1919, by his direction, said $40,000 note was turned over to Richard L. Williams, who held it, when the present decree was entered, as collateral security for a bona fide indebtedness, exceeding its amount, which George J. Williams owed him. On August 4, 1920, upon petition of Richard L. Williams, receiver, (setting forth that the trust deed then under foreclosure was a second lien, that the interest on the $40,000 note secured by the first trust deed had not been paid, and that he had in his possession moneys derived from rents which ought to be applied to that purpose) an order was entered, in said Cause No. B-47227, authorizing him to pay $4,000 on said accrued interest. The order simply directed payment to the owner of the

note without naming him. This paid the interest up to May 28, 1920. On August 6, 1920, a decree of foreclosure of said second trust deed was entered, finding that there was due to George J. Williams $11,034.50. On September 3, 1920, a sale of the premises was made to George J. Williams for $16,000, and a master's certificate of sale was delivered to him. There was a deficiency of $1391.27, due George J. Williams, for which Marion was personally liable, and a decree was entered accordingly. On December 17, 1920, George J. Williams and Richard L. Williams, as first parties, and Meyerowitz, then the owner of the equity of redemption, as second party, entered into a written agreement, in which were recited the proceedings to foreclose said second trust deed and the entry of said deficiency decree in favor of George J. Williams, that Williston, trustee, for use of Richard L. Williams, had filed a bill in said circuit court, cause No. E-68,311, to foreclose said first trust deed, that there still remained in the hands of Richard L. Williams, receiver, the sum of $9954.01, and that the parties to the agreement were desirous of settling their differences and dismissing said foreclosure suit, No. E-68311, and removing all of the incumbrances on the premises. It was provided in the agreement (1) that Meyerowitz deposit in escrow his quit claim deed, conveying all his right, title and interest in the premises to George J. Williams as grantee, the escrow agent to hold said deed subject to the conditions and performances thereinafter enumerated; (2) that Richard L. Williams, out of the moneys remaining in his hands as receiver, retain for his individual use the sum of $1733.33 (being interest accrued on said $40,000 note, secured by said first trust deed, up to September 28, 1920) and also retain the sum of $1500 for his fees as receiver and the fees of his solicitor, and also immediately pay to George J. Williams the sum of $1391.27, for the purpose of satisfying the deficiency decree

entered in said cause, No. E-47227, in the latter's favor, and also immediately pay the balance remaining, $5329.41, to Meyerowitz; (3) that the parties agree to the approval of the report of Richard L. Williams, as receiver, and to his discharge as receiver, and further agree that said cause, No. B-68211, be dismissed, but with the understanding that such dismissal shall not be construed as a release of said first trust deed, but that the same shall remain in full force and effect, drawing interest from September 28, 1920, and to the principal indebtedness thereof "shall be added the court costs accrued in said foreclosure to date, and the solicitor's fees and receiver's fees;" (4) that the deficiency decree in favor of George J. Williams be satisfied of record; (5) that Meyerowitz be given an option, at any time prior to May 1, 1921, to redeem the premises, discharging all existing incumbrances thereon and certain specified charges, by the execution of a new incumbrance in the principal sum of $35,000 and the payment of the balance due in money. It was further provided that the exercise of the option and the compliance with its terms, by May 1, 1921, would entitle Meyerowitz to releases of all incumbrances, except the new one provided for, and to the return of his quit claim deed deposited by him in escrow, but that if he failed to exercise said option within the time mentioned, such failure should be deemed a relinquishment by him of all claim to or interest in the premises, and would authorize the delivery by said escrow agent of the quit claim deed to George J. Williams. Meyerowitz did not exercise his option and the quit claim deed was delivered to George J. Williams and filed for record on June 6, 1921.

On September 26, 1921, Barnor obtained a judgment by confession in said circuit court against Marion for $5250,

upon a note dated September 16, 1921, for $5000 and attorneys fees. An execution was immediately issued and placed in the sheriff's hands, together with $10,638.33, for the purpose of making redemption from the master's sale of September 3, 1920, in cause No. B-47327. A certificate of redemption was issued and filed for record on September 28, 1921, and the sheriff made a levy, and, on October 25, 1921, sold the premises to Marmor for $16,074.13. On the same day George J. Williams surrendered his master's certificate of sale to the sheriff and received from him the redemption money deposited by Marmor. No further redemption having been made, the sheriff on December 30, 1921, delivered his deed to Marmor, and it was filed for record on January 14, 1922. In the master's report in the present cause, No. B-80913, he made findings that "Marmor obtained this note from Marion as security for a total loan made by Marmor to Marion of $600," and that "if this note was not paid, Marmor intended, when he took it, to redeem said premises, by confessing judgment on said note, from said master's sale of September 3, 1920."

On December 19, 1921, (default having been made in the payment of the $40,000 note, and no interest having been paid thereon since September 28, 1920), Richard L. Williams filed the present bill, alleging that he is "the legal holder and owner" of the note, making George J. Williams, Marmor, and others, parties, and praying for the appointment of a receiver to collect the rents. Notice of the proposed appointment of a receiver was given to George J. Williams, described as being the "owner of the equity of redemption." On the following day, and without notice to Marmor, the court appointed as receiver Victor Williams, also a nephew of George J. Williams, and he qualified as such and took possession. It is stated in the order that the complainant "be excused from giving bond." On January 3, 1922, on Marmor's

motion, Victor Williams was removed as receiver and he was ordered to file a report, and "on the court's own motion" the Chicago Title & Trust Company was appointed receiver, in place of Victor Williams, and it took possession. Subsequently Victor Williams filed his account as receiver and he was discharged, after paying over the balance in his hands to the Chicago Title & Trust Co. He was allowed $50 for his services and $75 for those of his solicitor.

In the answer of George J. Williams to complainant's bill he alleges that he "is seized in fee simple to the legal title in the premises, subject only to the lien of the trust deed * * sought to be foreclosed," but that Marmor claims some interest therein in opposition thereto.

In the answer of Marmor, after reciting some of the facts above mentioned, he made three contentions or defenses, all of which were denied by the master on the hearing, and these rulings subsequently confirmed by the court. Two of the contentions need not be mentioned as counsel for Marmor here expressly waive any possible error in the adverse rulings thereon. The third contention was in substance as follows: That complainant, Richard L. Williams, is not the bona fide owner of the $40,000 note sought to be foreclosed, but that George J. Williams has always been and is the real owner, - Richard L. Williams only holding it as collateral security for an indebtedness owing to him from George J. Williams; that the principal sum of $40,000 is not due on the note, or interest from September 28, 1930; that complainant, in his capacity as receiver, has received large sums of money as rent from the premises, which in equity should be applied upon said principal sum and interest; that George J. Williams was in actual possession of the premises from September 28, 1930, down to December 30,

1921, and collected the rents; that the gross rentals collected for said period amount to over $16,000; and that Harmer is entitled in equity to have said rentals, after deducting reasonable operating expenses of the premises, credited and applied in the present foreclosure proceedings upon any amount found to be due to complainant, or other person found to be the owner of said $40,000 note. The adverse ruling of the court on this third contention is relied on by counsel for Harmer in the present appeal as constituting error. The pertinent findings of the master, confirmed by the court, are as follows:

> "It is contended by counsel for complainant herein that upon the delivery of the quitclaim deed of Samuel Meyerowitz to George J. Williams in June, 1921, the latter, being the holder and owner of the master's certificate of sale issued pursuant to the master's sale held September 3, 1920, in cause B-47227, became the owner in fee simple of said premises; that there was thus a merger and the foreclosure proceedings in said cause, B-47227, were wiped out, and the redemption by Harmer * * was invalid. Whatever merit there might be in this contention is lost by the fact that George J. Williams took down and received from the sheriff the redemption money, being the sum of $10,638.33, deposited with said sheriff by said Harmer to redeem from said master's sale of September 3, 1920, * * . George J. Williams and his pledgee, Richard L. Williams, in view of the taking by George J. Williams of said redemption money, are both estopped to deny the validity of the redemption, and are estopped to deny that upon the issuance of said sheriff's deed to Alexander W Harmer, on December 30, 1921, said Harmer became the owner of the equity of redemption in said premises. George J. Williams is, therefore, not the owner of the equity of redemption in said premises, notwithstanding the said deed to him from Meyerowitz.
>
> But the master finds that said Harmer had no right, title or interest in or to the premises prior to the date of the judgment, execution and levy of September 26, 1921. So far as Harmer is concerned, George J. Williams had none of the duties and liabilities of a mortgagee in possession of said premises prior to December 30, 1921, the date of the execution and delivery to Harmer of said sheriff's deed. Harmer is not concerned with the application of the rents derived from said premises prior to December 30, 1921. So far as Harmer is concerned, George J. Williams and Richard L. Williams could do with such rents as they saw fit. * * Harmer is the owner of the equity of redemption in said premises by virtue of said sheriff's deed, dated December 30, 1921, issued pursuant to said redemption made September 26, 1921, and is entitled to have the net rents collected by George J. Williams, or by any receiver herein, from said premises, for the

> period of time that has elapsed since December 30, 1921, applied first to the payment of the interest * * due on said principal note of $40,000, * * for the period of time from September 28, 1920, and next to the payment, as far as possible, of the principal of said note."

It appears from the above mentioned opinion of the Supreme Court (315 Ill. 178) on appeal taken by George J. Williams from the decree in question, that Williams' main contention in the Supreme Court was that the circuit court had erred in finding that Harmer was the owner of the equity of redemption in the premises and that Williams had no right, title or interest therein, because, by his contract with Meyerowitz and the ensuing quitclaim deed, he had merged the lien of said second trust deed and of the master's certificate of sale issued to him in the suit to foreclose it, cause No. E-47237, with the fee simple title, and in consequence had "extinguished the foreclosure proceedings, so that there was nothing from which Harmer could redeem." The Supreme Court, in its opinion, after discussing the contention, decided it adversely to Williams, saying in part (p. 183):

> "When a foreclosure suit is instituted certain statutory rights attach, first for the benefit of those directly interested in the land, and secondly for the benefit of judgment creditors. The statutory provisions which confer these rights cannot be disregarded. If an instrument is a mortgage when delivered it continues to be such, with its incidents, until the right of redemption is barred by some mode recognized by law. Parties can not, even by express stipulations in a mortgage, destroy or cut off the right of redemption. * * A master's certificate of sale does not purport to convey title but describes the premises purchased, the amount paid therefor and the time when the purchaser will be entitled to a deed if no redemption be made. * * Both before and after the sale under a foreclosure decree the owner of the equity of redemption has the same estate in the land. * * The acquisition of that estate or interest by the holder of the certificate of sale prior to the expiration of the period of redemption does not destroy the right to redeem by any person entitled thereto by the statute. Moreover, in the instant case, the right of Harmer to redeem was recognized by appellant (Williams), for after he had acquired, and while he owned, the interest of Meyerowitz in the property he surrendered his certificate of sale and accepted the redemption money

deposited by Marmor. Hence there was no merger, as appellant contends, of the lien of the second mortgage or of the certificate of sale with the fee simple title."

George J. Williams also contended in the Supreme Court that, even if there were no merger and the foreclosure proceedings were kept alive for redemption purposes, Marmor was not a bona fide judgment creditor without notice but was acting in collusion with Marion, who had no further title to the premises, for the purpose of depriving appellant of the benefits of his transaction with Meyerowitz. This contention was also decided adversely to Williams, the Court saying (p. 184):

"The master's sale occurred on September 3, 1920, and appellant became the purchaser. Meyerowitz, the owner of the equity of redemption, had, by statute, until September 3, 1921, to redeem. On December 17, 1920, he entered into the contract with appellant and Richard L. Williams, pursuant to which the property was conveyed to appellant, and by the contract Meyerowitz's right of redemption was limited to May 1, 1921, or shortened by four months and two days. The deficiency decree in appellant's favor was satisfied and Meyerowitz was paid out of moneys in the receiver's hands. Appellant paid nothing to Meyerowitz. By the satisfaction of the deficiency decree and the redemption from the master's sale nothing remained due and owing to appellant. Whether Marmor had actual or constructive notice of the contract and the quitclaim deed, or whether he could have compelled appellant to accept the redemption money, is not material to a decision of this case. Appellant surrendered his certificate and accepted the money. Redemption may be made by one who has no legal right to redeem if the holder of the certificate of sale accepts the money deposited for redemption. * * As between himself and appellant, Marmor became a redemptioner and entitled to all the rights as such.

Marion was in need of money and Marmor lent him $600. He took his debtor's note for $5000 as security upon the advice of his attorney that he could redeem the property if it should become necessary for his protection. It is not denied that Marion actually borrowed $600 from Marmor. If the indebtedness was bona fide, the fact that the judgment was confessed for the express purpose of enabling the creditor to effect a redemption from the sale of the property constitutes no legal or equitable objection to prevent redemption. * * The owner of an equity of redemption has the right to confess judgment for a bona fide indebtedness for the purpose of enabling a creditor to redeem. * * The judgment may be recovered upon an

indebtedness incurred subsequently to the expiration of the debtor's period of redemption. * * The right of the judgment creditor to redeem does not depend upon any lien on the land but exists solely by statute. * * The facts shown by the record are not of such a character as to vitiate the judgment recovered by Harmer against Marion."

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

It appears from the evidence that from September 28, 1920, down to December 20, 1921 (the day Victor Williams, as receiver, took possession of the premises following the filing of the present bill) George J. Williams was in actual possession of the premises, and collected rents in the sum of $16,359.11, and expended $9,221.18, leaving in his hands at the time he surrendered possession a balance of $7,137.93; that in said expenditures he included $817.95 (5% of $16,359.11) retained by him for making the collections, etc.; and that this sum of $817.95, added to said balance makes the total amount received $7,955.88, over and above his cash expenditures.

The main contention of counsel for Harmer on this appeal is, that said amount of $7,955.88 should have been applied on the accounting upon the mortgage sought to be foreclosed by complainant, and credited, first, to the payment of the interest accrued thereon since September 28, 1920, and the balance to the payment on the principal indebtedness as far as it would go, and that the trial court erred in not so decreeing. We think that this contention, under the somewhat peculiar facts disclosed, is sound and in accordance with equitable principles, especially in view of the decision of the Supreme Court on George J. Williams' appeal from the decree to that Court. George J. Williams appears to be the real owner of the $40,000 note in question, secured by the first mortgage sought to be foreclosed. He never transferred the note to Richard L. Williams absolutely but only as collateral security for an indebtedness which he owed Richard L. Williams, and the latter became the pledgee and holder of the note, not the absolute owner of it. When George J. Williams, also the owner of the Marion notes secured by the second mortgage and which mortgage

was foreclosed by him, took possession of the premises on September 28, 1920, after that foreclosure, with the apparent consent of said Richard L. Williams, we think it should be held that George J. Williams' status was that of a mortgagee in possession. It appears that he continued in possession and collected the rents from the premises until December 20, 1921, when Victor Williams, his nephew, was appointed receiver under the present bill filed by complainant, also a nephew of George J. Williams. It further appears that during said period, ending December 20, 1921, George J. Williams collected in rents something over $16,000, and disbursed something over $8,000 in necessary expenditures, leaving a cash balance in his hands (not including about $800 which he charged for making the collections, etc.) of $7,955.68. Yet it does not appear that he has accounted to anyone for this balance. Treating him as a mortgagee in possession we think he should be obliged to account in equity for these rents, which should be applied to the reduction, pro tanto, of the mortgage indebtedness owned by him. According to the decision of the Supreme Court, the deficiency decree in his favor under the foreclosure of the second mortgage was fully satisfied and nothing remained due and owing to him thereunder, and when he surrendered his certificate of sale and accepted the redemption money from Harmer, the latter, as a judgment creditor of Marion, "became a redemptioner and entitled to all the rights as such." His interest in the premises was subject of course to the first mortgage, but we think that he was entitled to have the amount, collected by George J. Williams as rents from the premises, less proper expenditures, applied in reduction of the amount due under said first mortgage, first, in payment of the accrued interest since September 28, 1920, and the balance on the principal as far as it will go. In 2 Jones on Mortgages, 6th Ed., Sec. 1114, it is said: "A mortgagee in

possession, whether in person, by trustee, receiver, or by a tenant, is in equity accountable for the rents and profits of the estate, and is bound to apply them in reduction of the mortgage debt. After paying the interest of the debt, any balance of receipts is applicable to reduce the principal. The mortgagee is not allowed to make a profit out of his possession of the estate. Therefore, upon a redemption of the mortgaged premises by any one interested in them, he is obliged to state an account of his receipts from the mortgaged property, and he is entitled to allowances for all proper disbursements made by him in respect of the premises." (See Strang v. Allen, 44 Ill. 428, 433; Wood v. Thelen, 93 Ill. 163, 171; Spaney v. Gray, 11 Ill. App. 213, 214; Van Eyck v. Snead, 15 Iowa 524, 528; Clark v. Paquette, 67 Vt. 681, 684.) In the case last cited it is said: "A mortgagee in possession must account for the rents and profits upon a redemption of the premises by any one interested in them. 2 Jones Mort. Sec. 1114. There is nothing in the character of a mortgagee's possession that suggests the possibility of an exception. He is treated as a bailiff of the mortgagor, and necessarily sustains the same relation to one who holds an interest in the equity by a title derived from the mortgagor." We cannot agree with the findings of the master, confirmed by the court, that "Harmor is not concerned with the application of the rents derived from said premises prior to December 30, 1921" (the date Harmor received the sheriff's deed to the premises); and that "so far as Harmor is concerned, George J. Williams and Richard L. Williams could do with such rents as they saw fit." We see no reason in equity why George J. Williams as mortgagee, or Richard L. Williams, as pledgee of the notes secured by said mortgage, should be entitled to receive more than the mortgage debt, interest and costs, as against the rights and interests of Harmor, as disclosed. And we

do not think that George J. Williams should be entitled to a commission of 5 per cent. on the rents collected by him, as against Harmer. (Harmer v. Ely, 70 Ill. 581, 587.)

On the day the decree appealed from was entered the court denied three motions made by Harmer, and his counsel here contends that the court erred in all of the rulings. We find no substantial merit in any of the contentions. Harmer moved that the court vacate the appointment of the Chicago Title & Trust Co. as receiver. It was then urged, as now, that, when on January 3, 1922, Victor Williams was removed as receiver on Harmer's motion, and the court upon its own motion appointed the Chicago Title & Trust Co. to act in his stead without requiring a complainant's bond, the court should have stated in the order of appointment that it was of the opinion that no complainant's bond should be required, in accordance with the provisions of the Statute (Cahill's Stat. 1923, Chap. 22, Sec. 55.) The Chicago Title & Trust Co. was appointed receiver in the place of Victor Williams because Harmer objected to his continuing to act as receiver, and when Williams was originally appointed the court stated in the order of his appointment that complainant "be excused from giving bond." We think that the provisions of the statute were sufficiently complied with. Harmer also moved the court to tax the costs of both receiverships against complainant. We do not think the court erred in refusing to do this. The appointment of a receiver under the circumstances was necessary and it does not appear that the charges of either receiver, including solicitor's fees, were improper or excessive. Harmer also moved that the Chicago Title & Trust Co. be removed as receiver, and that he be given possession of the premises, upon his giving a bond as provided by the statute (Cahill's Stat., Chap. 22, Sec. 56.) We think the court was fully warranted in refusing this motion.

The continuance of the receivership was proper, especially in view of the contentions of George J. Williams that he was the owner of the equity of redemption and that Marmer was not entitled to redeem, which contentions he proposed to have the Supreme Court pass upon. Furthermore, the statute in question does not purport to apply to such a situation as then existed. Marmer never had possession of the premises. When the receiver originally took possession it was not taken away from Marmer. And we do not think there is any substantial merit in counsel's further contentions that the decree should be reversed because of a variance between the allegations of the bill and the proofs, in that the bill alleged that complainant was the "owner" of the $40,000 note, while the proofs disclosed that he was merely the "holder" of it as collateral security for a separate indebtedness owing to him from George J. Williams.

Our conclusion is that, for the reasons stated, the decree should be reversed and the cause remanded with directions to the circuit court to modify it as to the amount decreed to be due, by crediting said sum of $7,955.56 (being the balance collected by George J. Williams in rents from the premises) plus interest at the legal rate thereon from December 28, 1921, on the first mortgage indebtedness, first, in payment of the accrued interest thereon since September 28, 1920, and the balance on the principal indebtedness of $40,000 as far as it will go. In all other respects the decree should be affirmed. It is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch, P. J., and Barnes, J., concur.

4322

50 - 29454

REGINA BOER,
Plaintiff in Error,

vs.

ALBERT REVESZ and
EMERY SZOKEN,
Defendants in Error.

237 I.A. 627

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is based upon a final judgment of the Municipal Court of Chicago, entered June 13, 1924, wherein the court, upon plaintiff's suit in assumpsit against defendants (commenced June 4, 1923) coming on for trial in regular course and she failing to appear, ordered that the suit be dismissed for want of prosecution.

One of the errors assigned is that "the Court erred in dismissing the case for want of prosecution." But this alleged error is not argued in the printed brief of her counsel, and the present record does not disclose that she made any attempt in the Municipal Court to have the order of dismissal set aside. Other errors are assigned, based upon prior orders of the Municipal court made in the course of the litigation, and they are urged and argued upon the theory, sustained by the established practice, that a writ of error to a final judgment brings up the whole record for review. (Drummer Creek Drainage District v. Roth, 244 Ill. 68, 72; Ruegle v. Horan, 293 Ill. 314, 321.) They will subsequently be discussed.

In plaintiff's amended statement of claim, filed in October, 1923, she alleged in substance that her claim is "for money due and owing her in the sum of $7,150," together with legal interest thereon from January 15, 1917; that prior to 1917 she came to this country from Hungary, worked for some time at

Gary, Indiana, built a house there, sold it, and had money in her possession; that defendants, knowing these facts and representing to her that owing to the then war conditions her money would purchase more in Hungary, suggested that if she would turn over to them $7,150, they would deposit 55,000 kronen in Austria-Hungarian money (which number of kronen said number of dollars would buy at the then rate of exchange) to the credit of her account in the Hungarian Postal Savings Bank, at Budapest, Hungary, and would deliver to her a pass book therefor; that on January 15, 1917, after negotiations, she deposited with defendants $7,150 and at the same time defendants executed and delivered to her the following paper:

"Chicago, Ill. Jan. 15, 1917.

Revesz & Szecks Steamship Agents	Received from Mrs. M. Demakas Eden Beer seven thousand and one hundred fifty dollars for (Foreign Money) Kronen 55,000, to be remitted to Hungarian Postal Savings Bank, Budapest. (signed) Revesz & Szecks per Revesz
$7,150	

She further alleged that defendants, in consideration of said deposit, then and there agreed with her that within a reasonable time "they would deposit 55,000 kronen to plaintiff's credit in said Hungarian Postal Savings Bank and would deliver to plaintiff a pass-book of said bank therefor," and further agreed, in the event they failed to so deliver the pass-book, "to return said $7,150 to plaintiff upon request;" that kronen were then of the value of 12-1/10th cents each and are now of the value of 70,000 for one dollar; that defendants never deposited said 55,000 kronen to plaintiff's credit in said bank or delivered the pass-book to her, although often requested; that after a lapse of a reasonable time, viz. on January 15, 1919, she demanded of defendants the pass-book, but defendants refused to deliver it; and that thereupon she demanded of them $7,150, which defendants refused to return, thereby "breaching their contract."

Defendants, in their affidavit of merits, denied substantially all of the allegations of the statement of claim, except the execution and delivery of the paper or receipt of January 15, 1917, and alleged in substance that on or about that date plaintiff instructed defendants to purchase for her with said deposit 55,000 kronen from the Trans-Atlantic Trust Co., of New York City, with instructions that it remit to said bank in Budapest the kronen and there place the same to her credit; that they purchased the kronen and so instructed the Trust Co. by mail on the same day; that in so doing they exercised reasonable care and acted simply as plaintiff's agents; that on January 17, 1917, said Trust Co., acting upon said instructions, forwarded by mail by a certain steamship to said Hungarian Bank a foreign exchange credit to be there placed to plaintiff's credit for 55,000 kronen; that, subsequently trade relations, mail service and communications of every kind between the United States and Austria-Hungary were terminated, and a state of war was proclaimed to exist between said countries, and, by proper authority, an alien-enemy custodian seized and took possession of all the papers, etc. of said Trust Co.; that on and prior to January 15, 1917, there was a general custom prevailing in Chicago relative to foreign exchange purchases and remittances, which was that, unless otherwise specified, all foreign exchange was remitted by mail; that at all times subsequent to the purchase and attempted remittance of the kronen plaintiff dealt direct with the Trust Co., relative to said purchase and remittance, and had no further dealings with defendants; that because of the War and said interruption of trade relations the Trust Co. several times tendered back to plaintiff the 55,000 kronen or their then equivalent in dollars, but that she refused to accept the tenders; and that defendants are not indebted to plaintiff in any sum.

It is disclosed from the present common law record or the

bill of exceptions in substance that in December, 1923, (about two and one-half years before the filing of the present suit) plaintiff commenced another suit against defendantsin said Municipal court, based solely on defendants' alleged failure to cause a remittance of said kronen to be placed to her credit in said Hungarian bank and the delivery to her of said pass-book; that no claim was made then of any verbal agreement between the parties that in case of such failure defendants would return to plaintiff upon request said $7,150; that there was a trial of said prior suit upon the merits, resulting in plaintiff taking a non-suit; that after the present suit was filed the defendants demanded a jury trial; that plaintiff made several unsuccessful efforts to have the cause advanced for hearing; that on January 24, 1924, the cause, in the absence of the defendants and their attorney, was called for trial, resulting in the jury returning a verdict against defendants for $9,633.00, being the full amount of plaintiff's claim, including interest; that judgment against defendants was immediately entered upon the verdict; that later in the same day, defendants' attorney, learning of these proceedings, appeared in court, moved that the verdict and judgment be set aside and a new trial awarded, and, upon certain testimony being heard in lieu of affidavits, the court ordered that the verdict and judgment be vacated, to which order plaintiff objected and she was given leave to file a bill of exceptions; that in February, 1924, the cause again came on for trial before a jury, at which both parties introduced evidence upon the merits, resulting in a verdict, on February 18, 1924, against defendants for $7,150, being the full amount of plaintiff's claim, without interest; that defendants moved for a new trial, and, after several continuances, the court, on June 9, 1924, granted a new trial and specially set the cause for trial on June 13, 1924, plaintiff having notice thereof; and that on June 13, 1924, neither plaintiff nor her attorney appear-

ing, the cause was dismissed on defendants' motion for want of prosecution.

The other errors assigned and urged by plaintiff's counsel are: (1) that the court erred in setting aside the verdict and judgment against defendants for $9,652.50 and in granting a new trial, on January 24, 1924, because in so doing the court abused its discretion, in that, while the testimony on the hearing of the motion to vacate may have disclosed a meritorious defense, a proper showing of diligence on the part of defendants or their attorney was not made and both were indispensable to sustain the court's action, and (2) in granting a new trial to defendants on their motion therefor after the verdict of February 18, 1924.

We do not think there is any merit in either of these contentions. The judgment was vacated on the same day it was entered, and on the hearing of the motion to vacate testimony was introduced tending not only to show that defendants had a meritorious defense to the suit but also that there were good and sufficient reasons why neither defendants nor their attorney were present in court when the cause was called for trial and the jury sworn on January 24, 1924, and that they were not lacking in diligence. The court's action was discretionary, and, under the facts and circumstances disclosed, we do not think the court abused its discretion. (Goffinger v. Klemm, 227 Ill. 588, 601; Culver v. Brinkerhoff, 180 Ill. 548, 552; Nichols v. Rogers-Nichols Commission Co., 203 Ill. App. 158, 163.) As said in the case last cited: "The appellant was not deprived of any right, for if he had a just claim against the appellee the court gave him an opportunity to present it." Furthermore it is the well established practice in this State for courts to be liberal in setting aside judgments taken by default, at the term at which they are entered, when it

appears that justice will be promoted thereby. (McMurray v. Peabody Coal Co., 281 Ill. 218, 226.) Furthermore, plaintiff, by afterwards appearing on the subsequent trial and prosecuting her claim before a jury upon the merits, waived her right to subsequently object to the setting aside of the former judgment in her favor (Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541, 542; Bingham v. Fitzgerald, 208 Ill. App. 268, 270; Crandall v. Kroetzer Fischer & Co., 158 Ill. App. 496, 498.) As to the contention that the court erred in granting a new trial after the verdict of February 18, 1924, it is well settled that the granting of a new trial is within the sound discretion of the trial court and its action in that regard will not be reviewed by an appellate court. (Weaver v. Crecker, 49 Ill. 461, 463; Constantine v. Foster, 57 Ill. 36, 40; Yerker v. Chicago & Alton Ry. Co., 235 Ill. 589, 600.)

For the reasons indicated this writ of error proceeding must be decided adversely to plaintiff's contentions. And we may say that plaintiff's case on the merits, as shown from the evidence heard on the trial in February, 1924, contained in the present record, is somewhat similar in its material facts to those in Fishman v. West Side National Bank, 228 Ill. App. 315, where a judgment, rendered upon a finding in favor of the plaintiff, Fishman, was reversed with a finding of facts.

Accordingly the judgment of the Municipal court, entered June 13, 1924, dismissing plaintiff's suit for want of prosecution will be affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

76 - 29434

PEOPLE ex rel MARGARET A. FLYNN,
Appellee,

vs.

FRANCIS X. BUSCH et al., as trustees and officers of the FIREMEN'S PENSION FUND OF THE CITY OF CHICAGO,
Appellants.

237 I.A. 627

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by respondents, as trustees, etc. from an order of the circuit court of Cook County, entered March 29, 1924, overruling their general demurrer to a petition for mandamus, and, upon respondents electing to stand by the demurrer, ordering the issuance of the writ, commanding them, as trustees, etc. to pay to petitioner $3,853.33, out of the funds of the Firemen's Pension Fund of the City of Chicago, and also the sum of $56.66 each and every month, beginning April 9, 1924.

It is alleged in the petition, filed March 18, 1924, that petitioner's husband, Frank B. Flynn, died on June 9, 1918; that on February 12, 1874, he was employed in the fire department of the city as an assistant engineer and served in that capacity until December 14, 1880, when he was promoted to the rank of engineer, in which capacity he served until March 31, 1887, when by direction of his superiors he resigned and was transferred to the electrical branch of the service and continued working therein until shortly before his death; that he served in the fire department for more than 13 years; that an act of the legislature, entitled "An act for the relief of disabled members of the police and fire departments in cities

and villages" was first passed in 1877, and was amended in 1879 (2 Jones & Add. Ann. Stat. p. 1266); that on May 13, 1887, a new act was passed, known as the "Firemen's Pension Fund Act," which was subsequently amended (2 Jones & Add. Stat. p. 1285); that provision is made in the act of 1877, as amended, for the payment of a pension to any member of the fire department who shall have served therein for the full term of ten years; that in section 9 of the act of 1887, as amended, it is provided (2 Jones & Add. Stat. p. 1290) that "The widows and orphans of deceased firemen and retired members of the fire department, who are now entitled to a pension or annuity under the provisions of an Act entitled 'An Act for the relief of disabled members of police and fire departments in cities and villages, approved May 24, 1877, as amended, shall be entitled to the benefits, pensions and annuities provided for by this Act; Provided such persons shall thereupon cease to receive pensions, relief or benefits under said Act of May 24, 1877;" and that "other sections of the Act as amended provide that the pension in such cases shall be equal to one-half the salary paid the fireman at the time of his separation from the service."

It is further alleged in the petition that Frank B. Flynn "paid into the fund provided for all assessments regularly made upon him by the board of trustees, as provided by the Act, and the regulations of said board of trustees passed in pursuance of the Act," and that he "complied with all the rules and regulations of said board of trustees as lawfully established both during his employment as a fireman and after his separation from the service in the fire department," and that he "was, therefore, at the time of his separation from the fire department, and at all times thereafter up to the time of his death, entitled to a pension under the action but did not receive such pension;" that upon

his death, which occurred on June 9, 1918, petitioner, as his widow, to whom he was married on June 19, 1878, "immediately became entitled to the pension to which said Frank B. Flynn was entitled during his lifetime and at the time of his death, under the provisions of section 9 of said act as amended in 1887," but that petitioner has not received such pension, or any relief or benefit; that immediately upon Flynn's death it became the duty of said board of trustees to place petitioner's name on the pension roll, and "pay her monthly a pension equal to one-half of the salary paid him according to his rank as engineer at the time of his separation from the service, which salary was $1360 per annum, or $113.33 per month," but that said board failed and neglected so to do, "though repeatedly requested;" that, after the continued failure of said board to perform said acts, she filed a petition on October 1, 1923, and an amended petition on November 28, 1923, (copies attached and made a part of the mandamus petition) with said board of trustees, requesting that they "comply with the law and place her name on the pension roll and direct that she be paid the pension to which she was entitled under the law, but that said board rejected such petition and failed and refused to so place her name on the pension roll;" and that there was at the time of the death of her husband, and at all times since, and is now, "ample funds in said Firemen's Pension Fund with which to pay her the amounts due her." The prayer of the petition is that the writ issue, commanding said trustees to pay to petitioner "the amount of money due on the date of the issuing of the writ," and also "the sum of $56.66 each and every month thereafter."

It is apparent that the circuit court, in entering the judgment order and in arriving at said amount of $5,853.33, found to be due to petitioner at the date of the order, allowed her as an accumulated pension $56.66 per month from the date of Flynn's death (June 9, 1918) up to April 9, 1924, which monthly

rate is one-half of the monthly salary which, as alleged, Flynn was receiving at the time he retired from service in the fire department. And it appears that petitioner's claim, as alleged, is in substance that Flynn (having retired after a service in the fire department of more than ten years and shortly before the new act of May 13, 1887, was passed) was entitled, under the act of 1877, as amended, to a pension, which he never received, and that, under the provisions of section 9 of the act of 1887, he having died, petitioner, as his widow, is entitled to recover from the board of trustees, to be paid out of the pension fund, the accumulated monthly pension, at the rate of $56.66 per month, from the date of Flynn's death, and also is entitled to be paid out of said fund said monthly sum as time goes on. Petitioner made substantially the same claim in her petition of November 26, 1923, filed with the board of trustees, which she alleges was "rejected" by the board. To support her claim she there relied, and now relies, on the case of O'Connor v. Trustees Firemen's Pension Fund, 155 Ill. App. 466, 475.

Two points are made by counsel for respondents as grounds for a reversal of the judgment order, i. e., that the petition is so defective and insufficient as required that respondents' general demurrer thereto be sustained, and that in any event, the amounts found to be due and to become due to petitioner as a pension were too large.

In support of the first point counsel contend in substance (1) that no ordinances of the City of Chicago are set forth showing the legal existence of the offices or positions which it is alleged Frank B. Flynn held prior to March 31, 1887, viz, that of assistant engineer and engineer in the fire department; (2) that the petition fails to allege that petitioner was unmarried during the period for which she claims a pension; and (3) that the petition fails to allege sufficient facts which,

if true, justify the issuance of the writ as prayed. We are of the opinion that all of these contentions are well founded. The first is sustained, we think, by the holdings in the cases of Stott v. City of Chicago, 205 Ill. 281, 286; Dullis v. City of Chicago, 235 Ill. 472, 474; Gorsch v. City of Chicago, 250 Ill. 551, 553; and Fitzgibbons v. Lawrence, a case decided by the first division of this appellate court on October 20, 1924, No. 29344. In the case last cited, Fitzgibbons filed a petition asking that a writ of mandamus issue against the members of the "Retirement Board of Policemen Annuity & Benefit Fund of Chicago," commanding them to pay him certain amounts as pension. The respondents filed a general demurrer, which was overruled, and, upon their electing to stand by their demurrer, the court ordered that the writ issue according to the prayer of the petition. In reversing the judgment, the court said that the demurrer should have been sustained, and upon the grounds, among others, that the petition did not show the existence of the office of police patrolman, and that it was not sufficient to assert that petitioner was a "duly appointed" police patrolman. In the present petition the allegations are to the effect that Frank E. Flynn was "employed" in the fire department of Chicago in the capacities of assistant engineer and engineer from February, 1874, until March 31, 1887; that during said period he "served" in those capacities, latterly as engineer; and that on the last named date "by direction of his superiors he resigned." No facts are stated showing why he was directed to resign or whether or not he was then in good standing in the fire department.

As to counsels' second contention, certain sections of the act of 1877 as amended, of the act of 1887 as amended, and of the act of June 14, 1917 (Cahill's Stat. 1933, p. 694) may appropriately be referred to. It is provided in section 6 of the act of 1877 as amended (2 Jones & Add. Stat. p. 1369):

"Sec. 6. Then, in the judgment of the board, a sufficient amount shall have accumulated in said fund to justify the application thereof to the use for which the same is hereby created, * * if any member * * shall die after ten years' service in the police or fire departments and shall leave a widow, * * a sum not exceeding six hundred (600) dollars per annum, * *, shall be paid to such widow so long as she shall remain unmarried. * * ."

And it is provided in section 2 of the act of 1887 as amended (2 Jones & Add. Stat. p. 1289):

"Sec. 8. If any member of such fire department shall, * * while in said service, die from any cause while in said service, or during retirement, or after retirement, after 22 years' service as hereinafter provided, and shall leave a widow, * * said board of trustees shall direct the payment from said pension fund of the following sums monthly, to-wit: To such widow, while unmarried, thirty five dollars, * * ?"

And it is provided in section 10 of said act of 1917 (Cahill's Stat. 1918, p. 698:)

"Sec. 10. If any fireman shall die * * from any cause during retirement on account of disability, or during retirement after 20 years' service and while in good standing, as provided in this Act, and shall leave a widow, * * said board of trustees shall direct the payment from such pension fund of the following sums of money monthly: (a) to such widow while unmarried, forty-five dollars, * * ."

It thus appears to be the policy of the legislature in all of these pension fund acts that the widow of the deceased beneficiary shall only be entitled to a pension so long as she remains unmarried. Her remaining unmarried is made a condition to her continuing to receive a pension. And the fact, if it is a fact, that she has so remained during the entire period for which she claims a pension, was a necessary averment, without which she did not sufficiently show her right to the writ demanded. (Hartney v. Chicago Railways Co., 290 Ill. 84, 86.)

As to counsels' third contention, certain other sections of said acts of 1877, 1887 and 1917, may be mentioned. In section 3 of the act of 1877, as amended, (which was in force when Flynn retired from the fire department as alleged) power is given to the board of trustees to assess each and

every member of the fire department, "including all such persons who, having become entitled to the benefits of this fund while such members, * * have not forfeited their rights to share in such benefits after leaving such departments," a sum not to exceed $5 per annum; and there are provisions concerning how such assessments shall be paid, and under what conditions a member of the organization, if delinquent, may be reinstated; and it is provided that "the said board * * shall hear and decide all applications for relief under this act, and its decisions on such applications shall be final and conclusive, and not subject to review or reversal except by the board." In section 3 of the act of 1887 as amended there are similar provisions, but each member is to be assessed "not to exceed one per centum of the salary of such member so assessed." In section 7 of the act of 1877 as amended, it is provided that "any person," who shall serve in the fire department for 15 years, and "shall have paid into the fund * * all assessments regularly made upon him by the board of trustees * * and shall have complied with all the rules and regulations lawfully established by the board, * * as if such person was an active member in said * * fire department, may continue his membership in this organization, and be entitled to the benefits of this fund after he shall have ceased to be a member * * by complying with all the provisions of this act, relative to the payment of assessments, etc. the same as prior to his ceasing to be a member of such department, and the widow * * of such person shall be entitled to all benefits hereby secured to other members of this organization." In section 7 of the act of 1887 as amended, provision is made that upon the retirement of a member of the fire department "on account of disability," contracted while in the service, the board "shall order the payment to such disabled member, * * monthly, from said pension fund, a sum equal to one-half of the monthly com-

pension allowed to such member as a salary at the date of his retirement. In section 13 of the act of 1917 it is provided that "all other persons" (meaning those not under the provisions of the Civil Service Act) who "have contributed to any firemen's pension fund, * * shall also be included within the meaning of the term 'fireman or firemen' as used in this Act, and shall be entitled to the benefits of this Act;" and that "any fireman who shall have served the required period of probation in the fire department * * and shall have remained five years under the protection of such pension fund shall not be removed from same because of involuntary transfer from the fire department to some other department of such city, provided, however, that he shall pay into said pension fund each month an amount equal to that which he would be required to pay in the position he occupied while in the employ of the fire department." In section 14 of said act of 1917 it is provided that "the widows * * of deceased firemen and all retired firemen who are receiving or entitled to pensions under any other firemen's pension law in force * * at the time this Act shall become effective, shall be entitled to the benefits and pensions provided for by this Act, and none other, from the time that this Act shall become effective."

In view of the above provisions contained in the several acts mentioned we are of the opinion that the petition is lacking in averments of essential facts. While it is alleged that Flynn "paid into the fund * * all assessments" made upon him by the board and that he "complied with all the rules and regulations" of the board, both during his employment as a fireman and after his separation from that service, we do not think that these allegations, taken with the other allegations, show a sufficiently clear right in petitioner to the writ demanded. By section 9 of the act of May, 1887 as amended it is provided

in substance that the widow of a deceased fireman and retired member of the fire department, who is "now entitled" to a pension under the provisions of the act of 1877 as amended, is entitled to the same pension or benefits. For aught that appears to the contrary Flynn, after his retirement in March, 1887, may not have "continued his membership in the organization" (Calder v. City of Chicago, 176 Ill. App. 313, 315), or may not have been in good standing in the department when he retired, or, after retirement, he may have applied for a pension or benefits and his application have properly been refused by the board, in which event its decision under the provisions of both acts would be final and conclusive (Eddy v. People, 219 Ill. 611, 616). Furthermore, when petitioner, as widow, made her written application for a pension to the board in October, 1923, followed by an amended application on November 28, 1923, there are no allegations in the petition as to what afterwards occurred before the board beyond the statement that the board "rejected" the application and "refused" her a pension. The reason why the board so decided is not alleged, and for aught that appears to the contrary it may have had ample justification for its decision. (Calder v. City of Chicago, 176 Ill. App. 313, 316; Bonner v. City of Chicago, 176 Ill. App. 317, 319.)

We deem it unnecessary at this time to enter into a discussion of the further question raised by respondents' counsel, in case petitioner should ultimately be found to be entitled to a pension, as to what would be the proper monthly amount thereof, she remaining unmarried. It will be noticed that the amounts to be paid under certain conditions to the widow of a deceased fireman or retired fireman vary in the several acts mentioned, and that it is provided in section 10 of the act of 1917, where a fireman dies, "during retirement

after 20 years service and while in good standing," the board shall direct the payment from the fund to the widow, while unmarried, of forty-five dollars, monthly. And in this connection, it being alleged that Flynn died after the act of 1917 was passed, reference may be made to the cases of Hughes v. Traeger, 264 Ill. 612, 617, and Peggy v. City of Chicago, 265 Ill. 78, 80, where it is decided in substance that a person does not acquire a vested right in a pension fund as against a subsequent change in the law.

For the reasons indicated we are of the opinion that the circuit court erred in overruling respondents' demurrer to the petition and in entering the judgment order. Accordingly the judgment is reversed and the cause remanded with directions to the circuit court to sustain the demurrer and to grant leave to petitioner, if she so desires, to either amend her petition or file an amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch, P. J., and Barnes, J., concur.

51 - 29489

237 I.A. 627

DOMINICK GAVIGAN,
Appellee,

vs.

CHARLES R. GOLD,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRINNELL DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries sustained by plaintiff in an automobile accident on October 27, 1921, shortly after midnight, on Michigan avenue at Park Row (one half block north of 12th street) in the City of Chicago, the jury returned a verdict in his favor for $12,000. He remitted $3,000, and on February 16, 1924, judgment was entered in the Superior Court of Cook County against defendant for $9,000, and this appeal followed.

Plaintiff, a police officer in citizen's clothes, after walking northward on the west side of Michigan avenue from 12th Street to Park Row, turned east and attempted to cross the avenue, which at the time was torn up for repairs being made in its east half. For several blocks northbound and southbound vehicles were using the west half of the avenue, but there was no indication, by a line painted on the street or otherwise, where the middle of the west half was. The street lamps on both sides of the avenue and those on the posts of the safety islands were lighted, and certain illuminated sign boards furnished additional light. Plaintiff's testimony, supported by that of four other witnesses called in his behalf, was to the effect that when he started east across the street there were lines of automobiles approaching from the north and from the south; that the nearest automobile approaching from

the north was defendant's, which was then about 250 feet away, and the nearest automobile approaching from the south was 125 feet away; that he walked across the west half of the roadway and to a point about 4 feet east of the center of the roadway, where he stopped to permit two northbound cars to pass in front of him, and while standing there he was struck by defendant's southbound car about the time that the second of the two northbound cars was passing him; that defendant was driving his car either wholly or partially in the east half of the roadway, at a rate of speed from 25 to 30 miles per hour, and without blowing his horn or otherwise giving plaintiff notice; and that as a result of the collision plaintiff suffered serious and permanent injuries. Defendant's testimony was to the effect that he was driving his car about in the center of the roadway at a speed from 18 to 20 miles per hour; that when his car was about 30 feet away he saw plaintiff start to cross the street; that he then, but not afterwards, blew his horn; that plaintiff walked part of the distance across the west half of the roadway and then ran to a point about two feet east of the center of the roadway, when he stepped and stepped backward; that the left front fender of defendant's car struck him and knocked him down; and that defendant stopped his car within about 15 or 20 feet.

Plaintiff's original declaration consisted of three counts - the first two charging defendant with the negligent violation of the provisions of the Motor Vehicle Act as to speed, and the third charging him with general negligence in the operation of his car. Defendant pleaded the general issue. Plaintiff filed an additional count charging defendant with wilfulness and wantonness, but the court instructed the jury to disregard this count.

Immediately following the accident plaintiff was

found to be unconscious and bleeding from the nose and ears. He was taken to a hospital where he remained for nearly a month. His skull and one of his shoulders were fractured. The fracture of the skull involved the semi-circular canals of the left ear, causing total and permanent deafness in that ear. His eyesight also was permanently impaired, and while convalescing he had severe headaches and much dizziness and suffered great pain. He did not return to his work as a police officer until about a year after the accident, when he was given "light" work. At the time of the accident he was receiving from the City a salary of $2,300 per year, which the city continued to pay to him during the year of his convalescence. At the time of the trial he was being paid a salary at the rate of $2400 per year.

Defendant's counsel urge as grounds of reversal of the judgment (1) that defendant was not guilty of any negligence which proximately caused the injuries, and that plaintiff was guilty of contributory negligence; (2) that the verdict was the result of passion and prejudice, and so excessive as not to be cured by any remittitur; (3) that plaintiff's attorney during the trial made certain improper and prejudicial remarks; and (4) that the giving of instruction No. 7, offered by plaintiff, constituted error.

As to the question of defendant's negligence, the rate of speed at which he was driving his car at the time of the accident, even on his own testimony in this particular, is prima facie evidence of negligence on his part (Cahill's Stat. 1921, Chap. 95a, Sec. 22), as charged in the first and second counts of the declaration. In Martin v. Maxley, 255 Ill. 164, 167 it is held in substance that, in addition to proving a prima facie case of negligence under the statute on the part of the

party chargeable with so driving a vehicle, a plaintiff is still required to show that such negligence was the proximate cause of the injury and that he was not guilty of contributary negligence. And the prima facie case under the statute may be met or overcome by other evidence showing that the driving of the vehicle in excess of the mentioned rate of speed in the statute was not negligence under all the circumstances. In Johnson v. Vandergrant, 308 Ill. 255, 262, it is said: "As soon as opposing evidence is received the case is to be determined upon all the evidence, - the prima facie evidence and all other evidence, - and the question is whether the weight preponderates in favor of the party having the burden of proof. The streets and alleys are for the use of the public generally, and each person using the same has rights and assumes duties and obligations to others, and the plaintiff assumed the burden of proving that he was in the exercise of the care required by the law and that defendant was negligent in failing to observe such care. This was to be determined by the jury from all the evidence in the case." Applying these rules to the present case we fail to find evidence which even tends to show that defendant was warranted in driving his car at a rate of speed greater than that mentioned in the statute. It appears that the east half of Michigan Avenue was torn up for repairs and that both northbound and southbound vehicles were using the west half of the avenue; that there was an almost continuous line of vehicles being operated in both directions; that the street crossing was a busy one, though at the time no traffic officer was directing the traffic there; that defendant saw plaintiff leave the west curb and start walking across the street and later saw him standing east of the center of the roadway waiting for two northbound cars to pass in front of

him; and that the second one had just about passed him when the accident occurred. We think that under the facts and circumstances disclosed the jury were warranted in finding that the excessive speed at which defendant's car was moving proximately contributed to the accident. If it had been moving slower it would not have reached the point where plaintiff was standing waiting for the two northbound cars to pass and he could have proceeded eastward across the street, or defendant could the more successfully have turned his car towards the west and avoided striking plaintiff if he still remained in its path. Furthermore, in the third count defendant was charged with general negligence in the operation of his car. While the evidence is conflicting as to whether, after plaintiff had reached the center of the roadway or beyond and was waiting for the northbound cars to pass, he at any time stepped backward, defendant's testimony discloses that he saw plaintiff when he left the curb and again shortly before the happening of the accident, and it appears from a preponderance of the evidence that a portion of defendant's car was east of the center of the roadway as it moved southward, and it also appears that there was about 18 feet of unoccupied space between his car and the west curb of the street. Under these circumstances we think that the jury were warranted in finding defendant guilty of negligence under the third count. When he saw plaintiff standing in a position of danger he should have turned his car towards the west and thereby have avoided striking plaintiff. But he kept right on, practically in a straight course, and did not at the time even sound his horn.

As to the question of plaintiff's contributory negligence, we are of the opinion that, under all the facts and circumstances in evidence, the jury were warranted in reaching the verdict they did. It was for them to say whether or not

plaintiff was guilty of negligence in attempting to cross the street at the usual crossing even though he saw cars approaching both from the north and south. According to the preponderance of the evidence, when plaintiff started to cross, the nearest car approaching from the north, which was defendant's, was about 250 feet away. The traffic was practically continuous, and if plaintiff was to cross at all he was obliged to do so in front of approaching cars. It has frequently been held that a person attempting to cross the track of a street railway ahead of a moving car is not necessarily guilty of contributory negligence. (Loftus v. Chicago Railways Co., 203 Ill. 478, 480.) It is said in the Loftus case: "Such question must necessarily depend upon the proximity of the car and the speed with which it is moving, and upon all other facts material in determining the question whether it is or is not prudent to undertake such crossing. Whether, in such particular instances, reasonable care was exercised in going upon the track in front of a moving car is generally a question for the jury, under proper instructions." This rule applies, we think, to a pedestrian attempting to cross a street at the usual crossing where automobiles are almost continuously approaching the crossing from one direction or the other. And we think it was for the jury to say whether or not, under all the circumstances in evidence, plaintiff was guilty of negligence in stopping and standing where he did. It appears from the preponderance of the evidence that he stopped about 4 feet east of the center of the roadway; that he could not immediately proceed farther towards the east because of the close proximity of the two northbound cars; that he stood waiting for these to pass in front of him; and that he did not make any backward step, as testified by defendant. He says that while standing there he did not look towards the north, as he had done while in the act of

crossing the west half of the roadway. His attention was centered on the northbound cars. We do not think he was bound to anticipate that defendant would negligently drive his southbound car in the east half of the roadway, particularly as there was plenty of room for the passage of southbound vehicles in the west half. As said in Chicago City Ry. Co. v. Fennimore, 199 Ill. 9, 17: "Anticipation of negligence in others is not a duty which the law imposes." Furthermore, even if it should be considered that plaintiff was guilty of negligence in undertaking to cross the roadway, in view of his knowledge that he might be compelled to stop and stand in the middle thereof to allow certain northbound cars to pass, still we think it was for the jury to say whether, under all the facts and circumstances, his act of crossing was the proximate cause of his injury, or only furnished a condition by which it was made possible by the subsequent negligent conduct of the defendant. Negligence on plaintiff's part in the respect mentioned, if any there was, would not bar a recovery by him unless it was the proximate cause of his injury. (Consolidated Coal Co. v. Bakemp, 181 Ill. 9, 18; St. Louis Stock Yards v. Godfrey, 198 Ill. 288, 296; Leratta v. Director General, 306 Ill. 348, 352.) In Jenkins v. La Salle County Coal Co., 264 Ill. 238, 241, it is said (quoting from Smith v. Commonwealth Electric Co., 241 Ill. 252, 259):

> "If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury. * * The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and if so, the connection is not broken; but if the act of the third person which is the immediate cause of the injury is such as in the exercise of reasonable diligence would not be anticipated, and the third person is not under the control of the one guilty of the first act or omission, the connection is broken and the first act or omission is not the proximate cause of the injury."

As to the claimed excessiveness of the verdict we cannot say, in view of the permanent injuries sustained by plaintiff and his pain and suffering, that the amount, as remitted to $9,000, is excessive, or that the verdict as returned was the result of passion and prejudice upon the part of the jury. And we do not think that the remarks of plaintiff's attorney complained of, which were made during his address to the jury, constituted reversible error. He said in substance that if the jury found the defendant guilty and plaintiff entitled to damages, the verdict "should be for such a sum that you can say * * is full compensation for all the losses that this man has sustained, past, present and future, and don't bother yourselves about whether - where the money will come from; give him all he is entitled to." It is contended that the words, "don't bother yourselves about * * where the money will come from" practically informed the jury that defendant was protected by liability insurance. We cannot agree with the contention. (See Burgess v. Stowe, 134 Mich. 304, 308.) Furthermore, the bill of exceptions discloses that no objection was made to the remarks at the time. (Brant v. Chicago & Alton R. Co., 294 Ill. 606, 621.)

Plaintiff's given instruction No. 7, complained of, was one in the usual form concerning damages, and its concluding paragraph was as follows:

> "And you are further instructed that in estimating and assessing plaintiff's damages, if any, defendant is not entitled to and should not be given any credit, deduction or set-off for or on account of any salary which the City of Chicago paid to the plaintiff for such time, if any, that plaintiff was necessarily off duty and incapacitated from the performance of his duties as a police officer, as the direct result of his injuries. The case should be considered the same as though the City had not paid the plaintiff any salary during such time."

We do not think that the trial court erred in giving this instruction. It appears that the payment to plaintiff by the City of his salary as a police officer during the year of his convalescence was a pure gratuity. In 1 Sutherland on Damages, 4th Ed., p. 487, sec. 158, it is said:

> "Generally there can be no abatement of damages on the principle of partial compensation received for the injury where it comes from a collateral source, wholly independent of the defendant, and is as to him res inter alios acta. * * A man who was working for a salary was injured by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant in mitigation."

In 18 L. R. A. (Ann.) 678, in the note following the report of the case of Dunnion v. Superior Iron Works Co. (see 175 Wis. 172, 183) it is said:

> "Although the courts of different jurisdictions are not in entire agreement on the question, the amount of a recovery from a third person who is responsible for a personal injury is, in most jurisdictions, held not to be affected by the receipt by the plaintiff from his employer of wages or salary for the period during which he has suffered from the injury."

In this connection reference may also be made to the cases of Hayes v. Morris & Co., 98 Conn. 603, 607; Nashville, etc. Ry. Co. v. Miller, 120 Ga. 453, 455; Ohio, etc. R. Co. v. Dickerson, 59 Ind. 317, 324.

Our conclusion is that the judgment of the Superior Court should be affirmed, and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

96 - 29505

JOHN H. MEIER,
Appellee,

vs.

JOHN A. BECK CO.,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced in the Municipal Court of Chicago and tried without a jury, the court found the issues in plaintiff's favor, assessing his damages at $378, and entered judgment on the finding against defendant, and this appeal followed.

Plaintiff alleged in his statement of claim that defendant agreed to sell and deliver to him at La Salle, Illinois, a carload, of 36,000 lbs., at $1.15 per cwt., of "first quality No. 1, Early Ohio potatoes;" that after delivery he inspected them, found them to be of an inferior quality and so notified defendant, and offered to pay defendant therefor 90 cents per cwt.; that thereupon defendant directed him to accept delivery and pay the full amount as originally agreed, viz. $414, by taking up the draft drawn on him by defendant; and that defendant agreed to accept said new price and to refund to him the difference, amounting to $90. He further alleged that defendant agreed to sell and deliver to him at Kewanee, Illinois, another carload of potatoes of the same quality, of the same number of pounds, and at the same price per cwt.; that after delivery and inspection plaintiff found the potatoes to be of an inferior quality and so notified

defendant; that thereupon defendant directed him to take delivery of the last mentioned potatoes and to pay for and dispose of the same, and informed him that it would later, on demand, adjust the price and make an allowance to him because of said inferior quality; that he took delivery of, made payment for and disposed of said potatoes, as directed; that defendant, although often requested, has refused to adjust the price and make said allowance; that the potatoes were not reasonably worth to exceed 85 cents per cwt.; and that there is now due to him from defendant on account of said other carload the further sum of $108. He further alleged that defendant made a similar agreement for the sale and delivery to him at Galva, Illinois, of a third carload of potatoes of the same quality, of the same number of pounds and at the same price; that, after delivery and inspection being made and defendant being notified of the claimed inferior quality of the last mentioned potatoes, defendant gave the same directions and made the same promises as it did concerning the carload delivered at Kewanee, and plaintiff took delivery of, made payment for and disposed of said third carload; but that defendant has since refused upon request to make the agreed allowance; that said last mentioned potatoes were not reasonably worth to exceed 65 cents per cwt.; and that there is now due to plaintiff on account of said third carload the sum of $180. The total amount claimed to be due to plaintiff from defendant on account of all three carloads is $378.

In its amended affidavit of merits, sworn to by its agent, William Bernstein, defendant admitted the making of the three contracts for the sale and delivery to plaintiff of three carloads of "Early Ohio" potatoes, the delivery of the same at the respective places mentioned and the payment by plaintiff of the three drafts for the respective purchase

prices, but denied that the potatoes in any of the cars were of a quality inferior to those ordered, or that defendant made any agreement with plaintiff at any time to make any allowance or refund on the respective prices, or that the potatoes were not worth the prices as originally contracted for.

Counsel for defendant here urges in substance that the finding and judgment are not sustained by the evidence in that (1) plaintiff did not sufficiently prove that any new verbal agreements were entered into, as charged, relative to allowances and refunds; (2) that none of the cars, alleged to have contained potatoes of a quality inferior to those ordered, was sufficiently identified, and (3) that no proper proof of damages was made.

As regards the first point, the testimony of Kerley, plaintiff's agent, was to the effect that said new agreements were made over the telephone with defendant's agent, Bernstein, after the respective deliveries of the cars. Bernstein denied ever making any such agreements. We are unable to say that the court's finding, on the question whether such agreements were made, is manifestly against the weight of the evidence. But we are of the opinion that counsel's other points are well taken.

Plaintiff's evidence disclosed that about the time the three cars in question were delivered he received five other cars of potatoes - two at La Salle, one at Kewanee and two at Galva, but no proper identification of the three cars in question was made showing that they, or any of them, contained potatoes of a quality inferior to those ordered, or that the potatoes contained in said three cars were the ones that plaintiff afterwards sold at the lower prices mentioned in his statement of claim. As to

the claimed damages, the trial court at the conclusion of plaintiff's evidence said that it had not been shown what potatoes were damaged and that the court could not tell what plaintiff's damages were. Defendant's motion for a directed verdict, however, was denied, and, after Bernstein had testified for defendant (his testimony being limited to a denial of the making of any new verbal agreements) the court entered a finding and judgment against defendant for the full amount of plaintiff's claim. Plaintiff's evidence disclosed that the potatoes in some of the cars remained on the trucks after delivery for several days during rainy weather, that he had difficulty in selling them, and that he finally sold them at such prices as he could get, but it was not shown what was the then market value of the potatoes in their then condition, or what they were reasonably worth. Furthermore, plaintiff claimed in his statement of claim that the "reasonable worth" of the potatoes, contained in the third car delivered at Galva, was not to exceed 65 cents per cwt., and that he was entitled to a refund of $180 on that car, yet plaintiff's evidence showed that he sold said potatoes at 80 cents per cwt., and the verdict is clearly excessive, even on plaintiff's theory, for the court included in the amount awarded $180 on account of the car delivered at Galva. For the reasons indicated we think that the finding and judgment are not sufficiently sustained by the evidence and that there should be a new trial of the case.

After the transcript of the record we filed in this appellate court, plaintiff's counsel made a motion, supported by written suggestions, to strike the bill of exceptions from the record and to affirm the judgment. The motion was denied. In his printed brief and argument, subsequently filed, he makes no attempt to answer the contentions made by defendant's counsel,

but again urges that the bill of exceptions be stricken and the judgment affirmed. His argument is in substance that, although the trial judge certifies to the bill of exceptions that the same contains all the evidence offered or received at the trial, still the bill on its face discloses that such is not the case, and that where this is so it will be presumed by the reviewing court (on error assigned that the verdict is not sufficiently supported by the evidence) that the missing evidence would have sustained the finding and judgment, provided it concerns and is material to a disputed issue in the case. In support of his contention and argument he cites the cases of Dahl v. Macdonald Engineering Co., 141 Ill. App. 187, 190; Andrzejewski v. Hill, 161 Ill. App. 376, 382; Christy v. Schwartzchild & Sulzberger Co., 160 Fed. Rep. 657, 659. We are referred to three pages of the bill of exceptions where it appears that when plaintiff's witness, Morley, was on the stand he was asked to identify the three drafts which plaintiff had paid for the three cars of potatoes (which drafts and the amounts thereof were admitted by the pleadings to have been drawn by defendant and paid by plaintiff); that he identified them; that said drafts were then offered and received in evidence, as Exhibits 1, 2 and 3, over the objection of defendant's attorney that they were not material to any issue made by the pleadings; that there then follows in the bill of exceptions a blank space for the insertion of copies of said drafts; but that said copies do not there or elsewhere appear in the bill. Inasmuch as the omitted drafts do not concern or throw any light upon any disputed issue in the case, we do not think there is such merit in counsel's point as warrants an affirmance of the judgment or that the rule announced in the cases cited should here be applied. In those cases the missing evidence had a material bearing on

certain issues in dispute.

The judgment of the Municipal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

60 - 29483

WILLIAM E. SHARP,
Appellee,

vs.

CHARLES COHN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 628

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Upon trial by the court judgment was entered against defendant for $133, from which he appeals.

Defendant's fourteen year old son negligently ran into and damaged plaintiff's automobile. Defendant told plaintiff to have his car repaired and send the bill to him and he, the defendant, would pay it. Plaintiff did so, but defendant refused to keep his promise, preferring a law suit.

Defendant's promise was an original undertaking and he is legally liable therefor.

This case should not have been in the courts, and as we are of the opinion that the appeal was taken for delay the judgment is affirmed with ten per cent damages, or $13.30, awarded to plaintiff in addition to costs.

AFFIRMED WITH DAMAGES.

Matchett and Johnston, JJ., concur.

95 - 29504

4327a

CLAUDE R. FAUNT,
Appellee,

vs.

HENRY G. ELFBERG,
Appellant.

APPEAL FROM THE SUPERIOR COURT
OF COOK COUNTY.

237 I.A. 628

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, Elfberg, questions a decree directing him to deliver to complainant, Faunt, 5,636 shares of stock in the H. Channon Company, entered after trial by the court of a proceeding in chancery, whereby complainant sought to recover these from defendant.

The parties were interested in the purchase and reorganization of the Channon Company and the controversy arises over their respective shares in the profits of this venture. Faunt alleges that their agreement was to share equally; that the resulting profits were 26,000 shares of the common stock of the reorganized company; that Elfberg received these shares, but that one-half equitably belonged to Faunt; that subsequently he sold 7,000 of such shares to Elfberg, leaving him 6,000 shares which he sought to recover. Elfberg by his answer denied that it was a joint enterprise and asserted that he alone purchased and reorganized the company; that Faunt did no more than tell Elfberg that the Channon Company was for sale and introduce him to Captain Channon, the owner; that for this service he agreed to give Faunt 8,643 shares of the common stock, not to be delivered until four years after the reorganization of the Channon Company. Elfberg admitted he had purchased from Faunt 7,000 shares for $35,500, and asserts that this left Faunt the equitable right to 1,643 shares, which Elfberg offered to deliver at the expiration

of the four year period.

Captain Channon, an elderly man, desired to sell the business of H. Channon and Company, in which he owned virtually all the stock. Faunt was married to his granddaughter, and pursuant to a conversation with Channon had been attempting, without success, for two years prior to October, 1919, to make arrangements for the purchase of the business. In October Faunt told Elfberg that the company was for sale and succeeded in interesting him in the project. Elfberg took up the matter with Elston & Company, dealers in securities, and pursuant to a tentative arrangement with this company procured an option from Channon to buy his company for $900,000. By the tentative contract Elston & Co. was to audit the books and appraise the assets of the Channon Company and to determine by December 10, 1919, whether they would furnish Elfberg funds with which to buy. If the purchase was made a new corporation was to be organized and Elston & Co. and Elfberg were each to have certain specified shares of preferred and common stock. December 19th a final contract was made between them whereby Elston & Co. agreed to advance $900,000 to Elfberg, with which he was to buy the Channon Company, organize a new company and take over the assets and business of the old. The new company was to issue 10,500 shares of preferred stock and 40,000 shares of common stock. Elston & Co. agreed to buy from Elfberg all of the preferred stock and 14,028 shares of common stock for $900,000, leaving Elfberg 25,972 shares of common stock as his profit. By January, 1920, the purchase and reorganization were carried through on this basis.

March, 1920, by authority of Faunt, Elfberg gave Charles J. Knickerbocker an option for three years to buy for ten dollars a share 1,000 of the Faunt shares held by Elfberg. In the same month counsel for Elfberg prepared a declaration of

trust recitting that Elfberg was holding in trust for Faunt 8,650 shares of the common stock of the new company. In the summer of 1920 Elfberg purchased from Faunt 7,000 of these shares for $35,500 cash. In the early part of 1921 Faunt offered to sell to Elfberg his remaining shares for $6,000, and in January, 1922, made a similar offer. There is no substantial controversy as to these facts.

With all due regard to the weight to be given to the conclusion of the chancellor, consideration of the record compels a dissent from the decree sustaining Faunt's version of the agreement as to the distribution of the profits of the transaction. Elfberg's version is more probable, consistent and reasonable and therefore more believable.

Elfberg testified substantially that at the commencement of the deal no partnership arrangement of any kind was made with Faunt; that the price first suggested by Faunt at which the Channon property could be bought was $850,000, which was later raised to $900,000, Faunt explaining this by saying that Captain Channon had promised him the $50,000 difference for his services if the deal went through. Bernstein, vice-president of the Channon Company, testified that Faunt told him that Captain Channon had promised him a commission for his services. Faunt denies this. Whether or not Channon had in fact promised Faunt a commission is not of much importance. Elfberg says that after he entered into his first tentative contract with Elston & Co., Faunt told him that Captain Channon would not pay him a commission, and asked Elfberg to take care of him in the deal. The first Elston & Co. contract was then shown to Faunt and Elfberg said that upon that basis he would give Faunt for his services one-half of his common stock, but that if this agreement with Elston & Co. was changed he would make some other arrangement with Faunt

for his services, and Faunt agreed to this; that subsequently when Elston & Co. declined to carry out the first tentative contract but proposed a second, whereby Elfberg would receive no preferred shares of stock but 25,972 common shares, he advised Faunt of this proposed change and they then agreed that they would divide this common stock by each taking 5,000 shares and the remainder by Faunt taking one share to Elfberg's three. Subsequently Elfberg signed the second contract with Elston & Co.

Shortly after the execution of the Elston contract Faunt and Elfberg had a conversation in which computation was made on paper by Elfberg as to the respective shares of common stock they were to receive, and this was explained to Faunt, who agreed to it. This paper is in the record and shows that Faunt was to receive 8,993 shares and Elfberg 16,979 shares. It was also agreed that 350 of Faunt's shares would be given to other parties for services; that Elfberg was to hold Faunt's shares for four years, and that none of these shares was to be sold except to Elfberg.

In March, 1920, at Elfberg's request his counsel prepared a written declaration of trust, which recited that in consideration of services theretofore rendered by Faunt for Elfberg, and to carry out the terms of the verbal agreement between them, it was agreed, subject to the condition thereinafter stated, that Elfberg acknowledged that Faunt was the equitable owner of 8,650 shares of the common stock of the Shannon Company, the legal and record title to them being in Elfberg, who agreed to hold them in trust for Faunt for the period of four years from date, and at the expiration of that period to transfer them to Faunt subject to the option given to Knickerbocker to purchase 1,000 shares of Faunt's stock. The date of the instrument was in March, 1920. This instrument was not signed because at that time Elfberg was negotiating with Faunt for the purchase of some of his shares and subsequently did buy 7,000 of them and Faunt was urging Elfberg to buy the balance.

Elfberg says that the declaration of trust in full was read to Faunt who indicated that it expressed the agreement between them. Faunt says that Elfberg read only a part of it, "probably a page of it." The document is comparatively short, and if Elfberg read one page of it to Faunt this would give Faunt full information as to his number of shares held by Elfberg, for the amount is stated in the sixth and seventh lines of the document.

Faunt testified that he was unable to find out how many Shares Elfberg had received from Elston & Co. until Elfberg had filed his amended answer in this case, but in Faunt's bill of complaint sworn to by him almost a year prior to the date of the filing of this amended answer, he alleged that Elfberg had received 26,000 shares.

Elfberg purchased 7,000 of Faunt's shares for $35,500, and upon two occasions thereafter Faunt offered to sell his remaining shares for $6,000. Faunt authorized Elfberg to give an option to Knickerbocker for 1,000 of these shares. These undisputed facts tend to contradict Faunt's claim that during all of this time he was kept in ignorance as to the number of shares Elfberg held for him.

Furthermore, if Faunt thought he had 6,000 shares left after selling 7,000, it is not reasonable to believe that he would offer to sell these remaining shares for about one dollar a share shortly after he had received for his 7,000 shares about five dollars a share.

In many other details and particulars Faunt's testimony cannot reasonably be reconciled with the uncontroverted facts.

It would be contrary to probabilities and the usual experience in transactions of this sort for the parties to have divided the profits equally. The only service rendered by Faunt was to call Elfberg's attention to the matter and introduce him to Channon. After two years of unsuccessful effort, Faunt was more

likely to be content with the lesser share of the profits of what promised to be a successful deal. Elfberg did all the work of financing and reorganizing. The real responsibility was assumed by him and it was through his services that the deal was successful. His division of the profits impresses us as being more than fair to Faunt.

We do not place much weight upon the testimony of Kenneth F. Collins to the effect that Elfberg at one time told him that he had promised to give Faunt one-half of the profits. Collins had some animus against Elfberg, who had refused his request to testify for him in a suit he had brought against his former employers, Elston & Co. Collins did not pretend to remember the exact language of Elfberg, except the expression "one-half," which is consistent with Elfberg's testimony that he had told Collins he had first promised Faunt half of the common stock which he, Elfberg, was to receive under the first proposed Elston & Co. agreement. Collins was shown to be in error in other particulars in his testimony, so that his recollection after several years of the exact language used by Elfberg in a casual conversation is not of controlling influence.

We cannot accept complainant's version of the transaction in spite of the very earnest and ingenious brief on his behalf. Both the internal and external evidence give strong support to defendant's statement.

For the reasons above indicated the decree of the Superior court is reversed and the cause is remanded with directions to dismiss complainant's bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Hatchett and Johnston, JJ., concur.

137 - 29573

CARRIE A. MAGINNIS,
Appellant,

vs.

EUGENE MAGINNIS,
Appellee.

237 I.A. 628

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This appeal questions an order entered February 15, 1924, modifying the alimony provisions of a decree of divorce entered September 25, 1916.

The modifying order was pursuant to a petition filed by Eugene Maginnis, defendant, stating among other things that Carrie A. Maginnis, complainant, his former wife, was now remarried to a Mr. Miles. The defendant was thereupon relieved from the payment of weekly alimony and also from the payment of premiums on a life insurance policy provided for by the decree of divorce. The complainant questions only the modification with reference to this policy. She contends that the provisions of the decree of divorce with reference to alimony and the insurance policy were pursuant to a definite and absolute agreement between the parties, and that such settlements are legal and approved by the courts. Such agreements have been frequently approved by the courts of this state. Buck v. Buck, 60 Ill., 241; Strubher v. Belsey, 79 Ill. 397; Storey v. Storey, 138 Ill., 610; Miller v. Miller, 234 Ill., 19.

At the time of the divorce the parties had one child, a daughter eleven years old, who was awarded to the custody of the mother. The decree provided with respect to alimony that the defendant should pay complainant "so long as she shall remain un-

married," for the support and maintenance of herself and child, twenty-five dollars a week and "until the further order of this court." It was further provided that the defendant should pay premiums accruing from time to time thereafter, upon an insurance policy on his life for not less than $5,000, the complainant and their child Nimetta to be named as the beneficiaries. There was also an award of the household furniture and fixtures, and solicitor's fees and costs were also taxed.

In compliance with this decree and by agreement of the parties defendant placed this $5,000 insurance policy in escrow with his solicitor, Charles F. Loesch, and the parties joined in an escrow agreement wherein it was stated that the policy was to be held by such depository "for the benefit of my daughter and said Carrie A. Maginnis and not to be surrendered except upon written order of myself and the two parties above named."

The modifying order found that this insurance policy was only security for the payment of the alimony to the complainant during the period in which she should remain unmarried, and hence as complainant had remarried the order not only terminated the payment of alimony but also the obligation of the defendant to maintain the life insurance policy.

We hold that the record and evidence did not justify the chancellor in modifying that part of the decree of divorce with reference to the maintenance of the insurance policy. There is not a word in the record of the proceedings at the time of the original decree to indicate that the policy was intended only as security, but it affirmatively appears otherwise. Mr. Loesch, defendant's solicitor, interrogated the complainant as to her understanding of the terms of the agreement, and the chancellor

entering the decree especially commented upon this provision, indicating clearly that it was the understanding and agreement of the parties, their respective solicitors and the chancellor, that complainant and her daughter were to have the benefit of this life insurance policy unconditioned upon whether or not complainant should subsequently remarry.

This also appears from the language of the decree itself. The effect of the remarriage of the complainant is connected only with the provision for weekly payments of alimony. It is not connected either directly or by implication with the provision concerning the insurance policy.

From the very nature of the situation these provisions are unrelated; for how would the insurance policy secure to complainant the payments of weekly alimony? The benefits of the policy could not be invoked if defendant defaulted in the alimony. The only time complainant could avail of this was upon the death of the defendant.

A further consideration of influence is that the policy was to be not only for the benefit of the complainant but of the daughter, who should not be deprived of this because of the remarriage of the complainant.

The modification order of February 15, 1924, should not have changed the provisions of the divorce decree of September 25, 1915, relating to the insurance policy. The order is therefore reversed in the respect indicated and the cause is remanded for further proceedings consistent with what we have said herein.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

167 - 29583

S. C. MEYERS, doing business as MEYERS MOTOR CAR CO.,
Appellant,

vs.

COX-STRATTON CO.,
Appellee.

237 I.A. 628

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In this case the trial court evidently had difficulty in reaching a conclusion as to the character of plaintiff's claim and found the issues for defendant. The record justifies this, for plaintiff's claim is indefinite.

In his statement of claim plaintiff sets forth an alleged contract whereby defendant agreed to sell him, at a discount of thirty per cent, five motor cars and that relying on this agreement he purchased four of the cars and offered to purchase the fifth, which defendant refused to deliver, to the damage of the plaintiff. From this plaintiff's action seems to be based upon an alleged breach of contract, but there was no evidence that he bought or offered to buy any cars or suffered any damages by reason of the alleged breach.

Upon the trial, however, plaintiff's attorney stated that the suit was for commissions on sales of automobiles made by plaintiff for defendant. Defendant admitted the sale of four cars to customers brought by plaintiff, but says that it paid him the regular salesman's commission on these, five per cent, which plaintiff accepted, and this is not denied.

On this record plaintiff did not show himself entitled to any judgment against defendant, and the finding against him was the only finding which could have been entered. The judgment thereon is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

178 - 29594

MARY F. PECK, PHILLIP F. W. PECK and MARTHA W. JUDSON, as Trustees of the Estate of F. F. W. PECK,

Appellants,

vs.

REES DAVIS TOY CO., an Illinois Corporation,

Appellee.

237 I.A. 628

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was a tenant under a written lease from plaintiffs. The rent for certain months was unpaid and under the power to confess judgment in the lease plaintiffs had judgment entered against defendant for $575. Subsequently on motion, supported by affidavit, defendant was permitted to make defense and the case was tried by the court, which found the issues against the plaintiffs and entered judgment accordingly, vacating and setting aside the previous judgment.

The lease, dated February 28, 1922, demised the premises from March 1, 1922, to April 30, 1923; the rental to be paid in monthly installments. It contained a provision that the lessee "will not *** sublet the same, nor any part thereof, nor assign this lease, without in each case the written consent of the party of the first part had"***. The defense was that the lessors through their agents, who had full power to do so, waived this provision and gave defendant verbal permission to sublet the premises, which was subsequently revoked, after defendant had acted thereon.

Although an exhaustive brief has been filed on behalf of the defendant, we hold that this judgment of nil capiat cannot stand for the reason that it was not sufficiently proven that the

alleged agents of the plaintiffs had authority to waive this provision calling for the written consent of the lessors before the lessee could sublet.

Mr. Wyeth, the president and owner of all of the stock of the defendant corporation, testified in substance that he received verbal permission to sublet from a Mr. C. C. Sampson, and that relying upon this his company vacated the premises, but that plaintiffs refused to accept certain subtenants which were presented.

Mr. Sampson was in the employ of Ross & Co. from February, 1922, as manager of the "rental department." He says they are "rental agents" for the premises in question and are engaged in a general real estate business. The lease executed February 28, 1922, is signed on behalf of the lessors by "Thos. H. Erickson, agent." At this time Harrington & Co. were the real estate agents who handled for lessors the building in which the leased premises are situated. Subsequently (date not shown) defendant received a letter to the effect that Harrington & Co. were no longer the lessors' agents and requesting defendant to pay rent to Ross & Co. This is virtually all the evidence touching the authority of Sampson or Ross & Co.

It is strenuously argued that if plaintiffs wished to disprove the authority of Ross & Co., they should have done so by producing the testimony of Phillip F. W. Peck, one of the plaintiffs, who had an office in or adjoining the office of Ross & Co. It was not incumbent upon plaintiffs to do this. The authority of an agent must be proven, like any other alleged fact, by the party asserting it. The defendant alleged that Ross & Co. had full power and authority to waive the provision of the lease requiring written consent to subletting. It had the burden of proving this. The fact of agency or the nature of the extent of authority may be established by parole and circumstantial

evidence but ordinarily not by the acts alone of the alleged agent. There must be some act of the principal clothing the agent with apparent authority. The only act of the principals shown here in this regard limits the authority of Ross & Co. to receiving rent. It cannot be implied from the fact that Ross & Co. were agents to collect rents, that they have authority to waive the written provisions of the lease. Robinson v. Hanaghan, 92 Ill. App. 639; Morris et al. v. Taylor, 199 Ill. App. 583; Griffin v. Halbert, 196 Ill. App. 601; Heiboldt v. Best Brewing Co., 163 Ill. App. 246; Scanlon v. Noerth, 181 Ill. App. 582; Ray v. Baker, 118 Ill. App. 186.

Even assuming that Mr. Sampson had authority to grant permission to defendant to sublet, the record shows that any permission he gave for subletting was conditioned on defendant producing a responsible subtenant satisfactory to the lessors and that no such subtenant was produced. One subtenant produced wished to open a restaurant in the premises, but there was already a restaurant in the building under a lease containing a provision that the lessors would not rent to anyone else for a restaurant in the building. Another subtenant offered was a Chinese doctor, whose references not proving satisfactory, was not accepted. The conditions upon which Mr. Sampson consented to a subletting were never complied with.

The theory of the defense seems to be that the defendant, having been misled to its hurt by the attitude and statement of Mr. Sampson, is entitled to offset the damage suffered thereby against its obligation to pay the rent reserved in the lease. We do not understand upon what theory any claim for damages caused by the action of Mr. Sampson can be related to the obligation to the lessors for rent under the terms of the lease.

For the reasons above stated, the judgment of nil capiat of the trial court is reversed and judgment against defendant is entered in this court for $575, the amount of the original judgment.

REVERSED AND JUDGMENT HERE FOR
PLAINTIFF FOR $575.

Matchett and Johnston, JJ., concur.

194 - 29610

ISAAC R. CHALLAW and WILLIAM R. YOUNG,
Appellants,

vs.

CHARLES E. ARMSTRONG,
Appellee.

237 I.A. 629

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, bringing suit for a balance of $150 alleged to be due them for real estate broker's commissions on the sale of defendant's property, upon trial by the court suffered an adverse judgment, from which they appeal. The defense was that plaintiffs were not the procuring cause of the sale and did not produce any purchaser.

The court could properly find that in July, 1922, defendant Armstrong lived in and owned an apartment building at 4936 North Mansfield avenue, Chicago; a Mrs. Kaczmarick lived nearby in a building in which one of the plaintiffs, William Young, also had an apartment; he was associated with co-plaintiff, Challaw, in the real estate business; Mrs. Kaczmarick was told by Armstrong that he would like to sell his building, and she the same day, July 28th, telephoned this to her friend, Mrs. Szczepinski. In response to Mrs. Kaczmarick's telephone message Mrs. Szczepinski and her son came over to see her about the matter and to examine Armstrong's building. Young saw them from the window of his apartment and overheard Mrs. Szczepinski's son tell their purpose to Mrs. Kaczmarick. Young immediately came out from his apartment and informed them that he had the property for sale and asked them to wait there for a moment. He then ran to Armstrong's house, a couple of doors away, and informed him

that he had found a purchaser for his property and that he would bring her in to see him. Young then returned and in a few minutes brought the two ladies and the son into Armstrong's office. Armstrong showed Mrs. Szopinski through the premises and she informed him that she was willing to buy it at the price named. Fifty dollars earnest money was counted out by her son and laid upon a table and Young took it and put it in his pocket. A day or so later defendant, believing that Young had produced Mrs. Szopinski as the purchaser of his property, signed an agreement to pay "Challew & Young" $300 for their services as brokers in connection with the sale. Shortly thereafter Mrs. Szopinski informed Armstrong that she did not know Young and had never seen him except at the time she had called on Mrs. Kaszmerick, and that neither Young nor Challew had ever communicated with her in any way regarding Armstrong's property; that it was Mrs. Kaszmerick who had told her about it and had arranged for her to examine the property. Neither of the plaintiffs had ever heard of Mrs. Szopinski or had ever seen her or communicated with her before the day Young accidently saw her as she was about to enter the building to meet Mrs. Kaszmerick.

It needs only the recital of the above facts to lead to the conclusion that plaintiffs were not the procuring cause of the sale. This would have been consummated without any connection whatever of plaintiffs or either of them with the matter. It was a mere accident that Young happened to see Mrs. Szopinski and overhear that she might purchase the building. His alertness in misleading defendant and in seizing the earnest money does not commend itself to our approval. By the judgment, plaintiffs have been allowed to retain fifty dollars to which in justice they are not entitled, but this has been waived in this court by the defendant.

The judgment of the trial court is affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

204 - 29621

237 I.A. 629

MOLNAR JANOS,
Appellee,

vs.

SECURITY TRUST & DEPOSIT CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim alleges that defendant is in the business of renting safety deposit boxes for hire in Chicago; that plaintiff rented one of the boxes and deposited therein $965 and some papers; that defendant opened the box and took out the contents and subsequently gave the papers to plaintiff but not the money, defendant claiming that there was no money in the box when it was opened. Defendant admitted the renting of the box but asserts that for a time plaintiff was confined in the state prison at Joliet, Illinois, as a convict, during which time no rents were paid for the box, and that the defendant, according to the stipulation of the contract of leasing, did open the box and remove the contents after making a careful list of the same; that when plaintiff was discharged from prison he applied to defendant for the contents of the box, which were delivered to and accepted by him as full and final settlement, releasing defendant from all liability; that there was no sum of $965 or any other sum in the box at the time it was opened; that defendant delivered to plaintiff all the contents of the box. Upon trial the jury gave plaintiff a verdict for $965. From the judgment thereon defendant appeals.

The question involved is purely one of fact. Plaintiff's story is that his right name is Molnar Lasso; that he was

born in Roumania and naturalized here; that about December, 1915, he rented a box from defendant under his true name, Kolnar Lasso; that he put various sums of money in the box - at one time $300, at another time $800. Apparently he was under an indictment charging a felony, the nature of which does not appear; he says it was neither robbery, burglary, nor for killing any one. His lawyer in the criminal case was endeavoring to locate any money which plaintiff might have, so in July, 1916, plaintiff rented another box from defendant under the name of Kolnar James, and transferred the money from the first box into the second box. He says he did this "so that nobody can take my money;" that a lawyer was looking in every bank in Chicago wanting his money. In December, 1916, he went to the penitentiary at Joliet and returned from there in July, 1921. He was paroled to a Mr. Tucker, with whom he went to defendant's vault to get his money and papers. On request of defendant he paid $20 for the accrued back rent. Plaintiff says that the last time he went to the box before going to the penitentiary was in November, 1916; that at that time he had $960 in the box and put $5 more in it, and that he never had been at the box after that time. Other witnesses gave testimony tending to corroborate plaintiff's story. A teller of the Kasper State bank verified the collection of some $800 for plaintiff, which was paid to him. Another witness testified that he was with plaintiff in November, 1916, the last time plaintiff visited his box before going to Joliet; this witness says he saw a bunch of money in the box with a paper indicating that it was $960, and that plaintiff put in $5 more.

To meet this Mr. Allaby, manager of the defendant company, testified that the last time plaintiff visited the box was December 3, 1916; that thereafter the box was locked up until

November 12, 1920, when he broke it open under the orders of Mr. Dickinson, defendant's vice-president, in the presence of Mr. Dickinson and the cashier, Mr. Hoan; that the breaking of the box was pursuant to an endorsement on the contract of leasing; that at this time they found no money in the box; that subsequently, in July, 1921, plaintiff with Mr. Tucker visited the vault and after collecting $20 past due rent they gave him what they had taken from the box. Mr. Dickinson testified to the same effect; that when the box was opened under his orders the contents were spread out on the desk and that there were no bonds or securities or money; that a list of the contents was made up and they were sealed up in a bundle. Neither the contract of leasing which defendant says gave it the right to break open the box, nor the alleged list of the things taken from the box is in evidence.

The weakness of plaintiff's case was doubtless urged upon the jury and considered by it. The right of defendant to break open plaintiff's box is not satisfactorily proven. It is difficult to determine from the printed record where the truth lies. What we might have believed had we sat as jurors is not controlling. As a court of review we have no power to decide the facts contrary to the conclusion of the jury. Mirich v. Fernbaner Contracting Co., 312 Ill., 343. We can reverse only when we can say that the verdict is manifestly against the greater weight of the evidence. Whatever doubts we may have, we cannot arrive at this conclusion and therefore cannot disturb the verdict of the jury.

It seems to be suggested that plaintiff cannot maintain this action under the name he used when the second box was rented to him. The suit was brought in the name to which the box in question was leased and no valid reason is presented why

this is not permissible.

It is stated that the jury was not properly instructed, but in what respect we are not told.

For the reason above indicated the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

228 - 29645

HARRY H. SUSLAN and RAFAEL LOWENSTEIN,
Appellants,

vs.

WILLIAM THANOS,
Appellee.

237 I.A. 629

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McGURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an adverse judgment entered upon a verdict in a suit for $175, rent for April, 1923, brought against defendant as guarantor of rent of leased premises.

The evidence tended to show that one Xenos and defendant, Thanos, were at one time partners in business, leasing the premises in question; that defendant sold his interest to Xenos and negotiated with plaintiff for a new lease for the store to Xenos alone. Plaintiff agreed to this upon condition that defendant would guarantee the lease to Xenos. All the parties agreeing to this, the old lease to Xenos and Thanos was cancelled and a new lease made dated January 23, 1922, commencing February 1, 1922, and expiring April 30, 1925. On the back of the lease is the guarantee signed by defendant dated February 1, 1922. Xenos moved out leaving the April 1923 rent unpaid. Plaintiff re-rented the property for a period beginning May 1. Defendant was requested to pay the April rent on his guarantee but declined and this suit followed.

Defendant contends that as the date of the guarantee is subsequent to that of the lease there must be evidence of a new consideration to create liability of the guarantor. There was evidence that the lease and the guarantee were executed at the same

time. Under such circumstances the guarantee is regarded as being made at the same time as the lease so as to constitute a part of the same transaction and supported by the same consideration, and not to require a new consideration where it is executed pursuant to an understanding had before and is an inducement to the execution of the principal contract. 28 Corpus Juris, 918; Greiz v. Engel, 209 Ill. App. 193. The trial court was requested to so instruct the jury, but refused to do so. This was reversible error.

Evidence was admitted, over objection, as to the amount of rent called for by the new lease beginning May 1, 1923. The admission of this was improper. The terms of a new lease made after the termination of the lease guaranteed by defendant would not relieve him of his liability under the guarantee.

For the errors above noted the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

237 - 29654

JOSEPH SIPKA,
Appellee,

vs.

SAM BERMAN,
Appellant.

237 I.A. 629

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit in an action of forcible entry and detainer, had a verdict and judgment for possession. Defendant was in possession of the premises in question under a written lease which expired June 30, 1924. He refused to vacate after the lease expired and was still in possession July 24, 1924, the date of the trial.

The defense was an alleged agreement to extend the lease for a year after the date of its termination. The lease called for rental of $54 a month. Defendant says that in July, 1923, he made an agreement with plaintiff whereby, in consideration of an increased rent of $5 a month for the balance of the term under the written lease, it was extended for one year after June 30, 1924, the date it expired; that as evidence of this he gave plaintiff a check dated July 2, 1923, for $59 instead of $54, as specified in the lease; that endorsed on this check were the words "Increase $5.00. Extend lease for year from June, 1924;" that plaintiff accepted this as expressing the agreement for the extension. The testimony of three other witnesses tends to corroborate defendant's version.

On the other hand, plaintiff's version is that defendant also rented from him certain other premises, a storage flat for furniture, under a verbal lease. About April, 1923, defendant ceased to occupy the storage flat and plaintiff claimed

he had been damaged by defendant's occupancy to the extent of $300, and threatened to sue defendant therefor; that a compromise of this claim was made by defendant agreeing to pay $60 as compensation for the damages, to be paid in monthly installments of five dollars during the remaining period of the written lease of the premises in question; that pursuant to this, beginning with July, 1923, and for twelve months thereafter, defendant paid plaintiff $59 a month instead of $54, as named in the lease. There was other testimony tending to corroborate this.

Plaintiff denies that this payment of five dollars a month was in consideration of an extension of the lease and denies making any agreement with the defendant for an extension. Plaintiff also testified that when he received the check of July 2, 1923, the endorsement with reference to the extension of the lease was not on the check, and argues that this was placed thereon after it had passed through his hands. The bookkeeper of plaintiff who endorsed plaintiff's name on the check testified that the endorsement with reference to the extension was not on the check when he received it and endorsed it.

The controversy over the alleged agreement for an extension is close. We might properly content ourselves by relying upon the superior opportunities of the jury to observe the witnesses while testifying and to pass upon their credibility. However, there is another fact which probably was very influential in causing the jury to accept plaintiff's version. The check of July 2, 1923, is in the record before us and inspection of it leads readily to the conclusion that this endorsement with reference to an extension was not on the check at the time it was received by plaintiff and endorsed by him for deposit. Plaintiff's endorsement is very close to the end of the check and the words with reference to an extension are crowded in between plain-

tiff's name and the end of the check in an unusual and unnatural way. These words also appear to be in a different handwriting from that of defendant appearing on the face of the check.

We are not considering whether the memorandum on the check is sufficient in law to take the agreement out of the Statute of Frauds. If nearly a year before his written lease expired defendant made an agreement for an extension for another year, it would be reasonable to expect some formal writing to that effect.

Errors, if any, as to competency of evidence are not of controlling importance.

The check for rent for July, 1934, mailed by defendant to plaintiff, but which was not cashed by plaintiff and was tendered back to the defendant, did not constitute acceptance of rent for that month.

Considering the variant stories of the witnesses and the appearance of the check in evidence, we cannot say that the verdict of the jury is against the greater weight of the evidence. The judgment is therefore affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

370 - 29787

4335

M. N. DOUGLAS et al.,
Copartners as DOUGLAS
PRODUCTS CO.,
Appellees,

vs.

LOUIS MEYER,
Appellant.

237 I.A. 630

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit alleging that they were lessees from defendant of the first floor and basement of a building in Chicago; that defendants negligently permitted the drains and down spouts upon the building and the connection with the sewers to become so clogged and out of repair that rain and other moisture did not properly drain off into the sewers but seeped and flowed into the basement; that by reason of said negligence of defendant and in violation of his covenant to quiet enjoyment implied from said contract of leasing, the basement became flooded with rain water and other moisture, damaging large quantities of materials belonging to plaintiff stored in the basement; that in order to escape damage to other materials and merchandise stored in the basement plaintiffs were obliged to expend moneys for labor in order to remove such merchandise, but that by reason of said matters plaintiffs were damaged to the extent of $3413.15. Defendant's affidavit of merits was a denial that he permitted the drains and down spouts and connection to become clogged and out of repair; denied that he refused to repair the same; denied any violation of the covenant of quiet enjoyment or that plaintiff suffered any damages through the fault of the defendant. Upon trial by the court plaintiffs had judgment for $1601.00, from which defendant appeals.

The bill of exceptions has heretofore been stricken from the record, so the only errors for our consideration are those alleged to appear on the statutory or law record.

Defendant says the Municipal court had no jurisdiction for the reason that plaintiffs seek damages to personal property and also the cost of labor in moving certain other property. Section 2 of the Municipal Court act, chapter 37, gives the Municipal court jurisdiction of all actions on contracts, express or implied, where the amount claimed exceeds one thousand dollars, and all actions for the recovery of damages for injuries to personal property when the amount of damages exceeds one thousand dollars; such cases to be of the first class. Even if there should be a valid question as to the recovery for expenses of removing the merchandise, in the absence of a bill of exceptions and from the fact that while the total amount claimed was $3413.15, and the judgment rendered was for $1601.89, we must presume that the court included in its judgment only those damages of which it had jurisdiction in this action. Furthermore, a plea to the jurisdiction is waived by the defendant filing his answer and contesting the case on its merits. This question cannot then be raised for the first time in a court of review. Sala v. Stafford, 205 Ill. App. 588; Western Iron Co. v. Brittain, 206 Ill. Ill. App. 14.

It is said that the statement of claim does not set forth a cause of action for the reason that it does not show any express covenant on the part of the landlord to repair, or that the defendant owned the building, or that the down spouts and drains were located in any portion of the building over which the defendant had any control. In the absence of a bill of exceptions we must assume that all the necessary elements to support the

judgment were properly proven. After verdict, on motion in arrest of judgment or on appeal, everything which by fair and reasonable intendment may be inferred from the general averments of the declaration will be presumed. O'Rourke v. Spraul, 241 Ill. 376. No objection was made to the statement of claim in the trial court and under such circumstances a court of review will construe the statement liberally and every reasonable presumption will be indulged in favor of a cause of action. Genslinger v. New Illinois Athletic Club, 290 Ill. App. 428; Illinois Steel Co. v. Stanevick, 199 Ill. 122; Simonich v. Chicago & Alton R. R. Co., 217 Ill. App. 338; Harris v. Chicago N. W. Co., 314 Ill. 5[illegible]. The statement of claim alleges the existence of the relation of landlord and tenant between defendant and plaintiffs with relation to certain portions only of the building. This implies that the entire premises were not leased by the plaintiffs but that the landlord reserved control over and was responsible for repairs and condition of the roof, drains and down spouts, and we must presume that these facts were proven by the evidence.

Suit was first commenced by naming the plaintiff "Douglas Products Co., a Corporation." Upon the trial, by permission, the pleadings and processes were amended by substituting for this corporation certain individuals, (naming them) "Copartners doing business as Douglas Products Co." Such an amendment is permissible under the statute and was properly allowed. Section 30, chap. 110; Oberman v. Camden Fire Ins. Association, 314 Ill. 264.

As no errors have been presented requiring a reversal, the judgment is affirmed. AFFIRMED.

Matchett and Johnston, JJ., concur.

419 - 29536

4336

BURGE MACHINE WORKS, a Corporation,

Appellee,

vs.

S. HUGENDORF,

Appellant.

237 I.A. 630

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for the balance of the contract price for furnishing and installing a refrigerator in defendant's butcher shop. Defendant filed a plea of set-off, claiming that because of the faulty condition of the refrigerator, caused by failure of plaintiff to comply with its contract, some meat in it had spoiled, to the damage of the defendant, which he asked should be set off against the unpaid balance of the purchase price. Upon trial before a jury the court, apparently being of the opinion that there was no evidence tending to show failure of plaintiff to comply with the contract, excluded all testimony with reference to damages from the spoiled meat, and peremptorily instructed the jury to bring in a verdict for the plaintiff for $1,600, and judgment was entered accordingly, from which defendant appeals.

By the terms of the contract plaintiff undertook to furnish a refrigerator maintaining a temperature of thirty-three to thirty-eight degrees, and after the plant was started to furnish an engineer to operate it for two days. Plaintiff's evidence tended to show that the installation was completed March 24, 1922, and that for two days thereafter plaintiff's engineer, Elmer E. Block, continued on the premises operating the refrigerator.

Defendant's claim is that while the installation was apparently completed on this date, and a man left in charge by plaintiff for two days, that there was immediate trouble with the refrigerator in that it failed to maintain the temperature specified in the contract; that upon complaints being made it developed that the man left by plaintiff to operate it, in apparent compliance with the provision for an engineer to operate it for two days after installation, was in fact not an engineer but an inexperienced and incompetent helper, and that by reason of this the plant was improperly installed and operated so as to cause damage to the meat in the refrigerator; that although subsequently it was properly equipped and ran in a satisfactory way, defendant claims he is entitled to his damages caused by the non-compliance of plaintiff with the contract in this respect.

It is too well established to require citations that asking for a peremptory instruction is equivalent to an admission of every fact and conclusion in favor of the opposite party which the evidence tends to prove or which the jury may reasonably have inferred therefrom in favor of the opposite party.

Defendant's evidence tended to show that Mr. Block, plaintiff's engineer, who had installed the refrigerator, left it on March 24th in charge of a young man who did the piping and placing of the calcium; that plaintiff was promptly notified by defendant that the refrigerator was not doing its work properly and plaintiff promised to fix it; that from the time it was placed to April 12th, plaintiff was notified almost daily to put it in order; that Mr. Block, plaintiff's engineer, did not operate the machine for two days after its installation, but was sent away on another job; that subsequently, when he came to fix it, he said in substance that if plaintiff had allowed him to finish the job there would have been no trouble and that the young man left in charge of

it knew nothing about the work but just threw the calcium in, which caused the trouble; that from March 24 to about April 15, "the machine was wrong from morning to evening;" that this was constantly the condition since it was installed; that the temperature in the refrigerator went up to fifty-four degrees; that plaintiff's engineer said that the whole cause of the trouble was because the calcium had not been put in right. Vogt, the superintendent of plaintiff, inspected it in April and discovered the spoiled meat. There was more testimony to like effect.

It was not for the court, in the first instance, to weigh the evidence; this was exclusively for the jury, which should pass upon the variant stories of the witnesses.

That the bookkeeper may not have known anything about machines does not make incompetent her evidence tending to show that she made frequent complaints to the plaintiff. She was not testifying as an expert on machinery but upon the point of notice to plaintiff.

We are of the opinion that defendant should have been permitted to prove, if he could, his allegation that the machine was faulty through the failure of the plaintiff to comply with its contract and to show, if he could, that by reason of this failure he was damaged as claimed in his set-off.

The contract provides that in the event the purchaser fails to make the required payments on the purchase price, payments already made on the contract shall be retained by the seller as liquidated damages, the property rights in the plant remaining in the seller until all of the purchase price has been paid. It is contended that this gives plaintiff, in the event of a breach by defendant, a right only to take back the property, retaining whatever has been paid in cash as liquidated damages. This is a misapprehension of the law. The seller under such circumstances

has an option either to do this or bring suit for the balance of the purchase money. Shepard v. Mills, 173 Ill., 333.

For the reason that the trial court should have allowed defendant to present his claim to the jury, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

4380 - 29357

4337

WILLIAM HARRY BROWN, Doing Business as ANGO-SUMMIT DAIRY,
Appellee,

vs.

NOWRAN DAIRY CO., a Corporation,
Appellant.

237 I.A. 630

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSCHERLY DELIVERED THE OPINION OF THE COURT.

An auto truck belonging to plaintiff collided with a truck belonging to defendant. Plaintiff brought suit for damages, claiming that the accident was caused through the negligence of defendant's driver, and upon trial by the court had judgment for $437.53.

The accident happened in June, 1922, in the morning. Defendant's truck was going south on Wentworth avenue, in Chicago, and when about midway between 66th and 67th streets the driver slowed down and stopped, intending to turn westerly into a driveway into defendant's bottling works; plaintiff's truck coming behind it from the north struck defendant's truck with resulting damages to plaintiff's truck. Defendant's truck was large, one witness testifying that it had a capacity of five tons. Plaintiff's truck was considerably smaller.

The testimony of plaintiff's driver and his helper tended to show that the driver of defendant's truck, when it came opposite the driveway, without giving any signal turned his truck slightly to the east and then diagonally across Wentworth avenue towards the west and stopped; that because of the failure of defendant's driver to signal his intention to stop, it was impossible for the driver of plaintiff's truck, which was following about twenty-five feet behind, to stop or turn so as to avoid

a collision. Defendant's driver testified that he was driving south in the southbound street car tracks at about ten miles an hour; that when about fifty feet north of the driveway he slowed down and looked back and saw plaintiff's truck coming southward at a speed of about twenty-five miles an hour; that he, defendant's driver, held out his hand as a signal of his intention to turn, and moved slowly until about fifteen feet north of the driveway, when he made a turn of about two feet to the left and then turned to the west and stopped for plaintiff's truck to pass to the right between the front end of defendant's truck and the west curb of Wentworth avenue, a distance of about seven or eight feet.

The truthfulness of the conflicting stories, with reference to whether defendant's driver signalled by raising his hand, was peculiarly for the trial Judge to determine. If the case hinged solely upon this circumstance we could not say that the trial court improperly accepted the plaintiff's version. However, even if the record should justify the conclusion that defendant's driver was negligent in failing to signal, it shows clearly that the driver of plaintiff's truck was also guilty of negligence contributing to the accident.

Albert Bedina, a disinterested witness, testified that at this time he was driving a truck southward on Wentworth avenue approaching 65th place; that at about 65th place plaintiff's truck passed him going at a speed of twenty-five to thirty miles an hour; that plaintiff's truck continued towards defendant's truck "at a terrific speed, twenty-five to thirty miles an hour;" that as it approached defendant's truck it "made a break to go east;" that an automobile and a street car were coming north, preventing plaintiff from passing defendant's truck on the east or lefthand side, so it turned to the west, striking defendant's

truck; that there was ample room for plaintiff's truck to pass on the west or righthand side of defendant's truck. Hodine says that after plaintiff's truck passed him it made no change in its rate of speed until it struck defendant's truck; that he was less than half a block away when this happened.

The version of the accident given by this witness is the most believable and is in harmony with the admitted facts. The whole radiator of plaintiff's truck was smashed, the engine unseated and pushed back, the running board, front fender and front wheel smashed. These injuries tend to prove that plaintiff's truck was driven at high speed. This speed was prima facie evidence that the person operating plaintiff's truck was running at a rate of speed greater than is reasonable and proper. Motor Vehicles Statutes, chapter 95a, section 22.

Furthermore, instead of passing defendant's truck on the righthand side, where there was ample room, plaintiff's driver attempted to pass upon the lefthand side, into the track of northbound street cars, in violation of the city ordinance regulating traffic. Section 3836.

The excessive rate of speed at which plaintiff's car was driven and the attempt to pass defendant's truck on the wrong side were contributing causes to the accident, which bars a recovery by plaintiff. Where the negligence of both parties has caused an accident resulting in damages, neither can recover from the other.

The judgment is reversed and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Matchett and Johnston, JJ., concur.

471 - 29888

4338a

ARTHUR RITZ,
Appellee,

vs.

THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 630

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to collect $[illegible] which he claims to be due on a policy issued by the defendant on the life of plaintiff's wife, Elizabeth Ritz, for his benefit. Trial was before a jury, but the court instructed to find a verdict for the plaintiff against defendant for $[illegible], and from the judgment thereon defendant appeals. Plaintiff does not appear in this court to defend the judgment, and it is not clear as to the theory which moved the trial court to take the case from the jury.

The policy provides that no obligation was assumed by the defendant unless at the date of delivery the insured was in sound health. Upon written application, in answer to certain questions, the insured stated she had never been seriously sick, never had any disease, was never attended by a physician, had never had consumption, disease of the lungs or tuberculosis; had never been under treatment in any hospital, asylum, or other institution, and at the time of making the application was in sound health; that these answers and representations were strictly correct and true and should form the basis and become part of the contract of insurance, and any untrue answer should render the policy null and void.

The defense was based upon the alleged untruthfulness of these statements, and defendant offered evidence tending to show that the policy was dated February 20, 1922, and that the insured

died March 18, 1922, in the Chicago Fresh Air hospital from pulmonary tuberculosis; that the death certificate stated that the insured's health was first impaired one year before. There was also a death certificate issued to the Prudential Life Insurance Company, in which it was stated that she had been ill over ten months. The doctor issuing the certificate stated therein that he had this history from the patient. There was also evidence of physicians who attended Mrs. Ritz, one on November 17, 1921, who diagnosed her disease as pulmonary tuberculosis and gave it as his opinion that she had suffered from this for at least seven months prior to that time. A number of witnesses testified to the effect that the insured was suffering from tuberculosis prior to the date of delivery of the insurance policy. There was also evidence tending to show that she had been an inmate of the Chicago Municipal Tuberculosis Sanitarium prior to the delivery of the insurance policy. Other evidence tending to establish these facts was offered by defendant. The trial court, however, struck out all of the evidence offered by defendant.

Questions and answers in an insurance policy of this character, touching the health of the insured, are material to the risk and, even if not made warranties, are representations made as an inducement for the issuance of the policy, and if false render the policy void. Spence v. Central Accident Insurance Co., 236 Ill. 444; Weber v. Prudential Insurance Co., 234 Ill. 326; Hancock v. Knights of Security, 303 Ill. 66; Metropolitan v. Merryman, 214 Ill. 186. A large number of similar decisions might be cited.

Defendant was entitled to have its defense submitted to the jury. The action of the trial court in refusing this and instructing for the plaintiff was reversible error.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

4339

489 - 29906

PETER SCHRAMM,
Appellee,

vs.

JOSEPH MOLL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 630

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an automobile collision case in which, on trial by the court, plaintiff had judgment for $428. The controversy is over the facts of the occurrence.

Plaintiff's version is that he was driving his automobile southerly on Lincoln avenue, following a southbound street car. As they approached the intersection of Barry avenue, which runs east and west, the street car stopped on the north side of Barry avenue and plaintiff also stopped. When the street car moved on plaintiff followed until he had passed the center of Barry avenue, when he commenced making a left turn towards the east, but again stopped before reaching the northbound street car track on Lincoln until two northbound street cars had passed. A third northbound street car had stopped on the south side of Barry and plaintiff then drove towards the east, going in front of this standing northbound street car; after crossing the northbound car track and reaching a point about five or six feet east therefrom and five or six feet from the south curb line of Barry avenue, plaintiff's car was struck on the rear right side by defendant's automobile, driven by defendant, coming from the south on Lincoln avenue and passing the standing street car at a rate of speed estimated at twenty miles an hour.

Defendant strongly controverts the claim that plaintiff's car was south of the center of Barry avenue at the time of the collision, and also claims that plaintiff made the turn into Barry avenue at an excessive rate of speed. While plaintiff at one time answered in a way tending to place his position nearer the north curb of Barry, his subsequent statements, supported by other evidence, negatives defendant's version on this point. Just before the collision plaintiff had gone about twelve feet from a standstill, so that his automobile could not have been going fast.

A trial court has better opportunity than we have to weigh the conflicting testimony of witnesses and to determine the facts of an occurrence. We do not disturb the conclusion of the court unless we are convinced that it is clearly contrary to the weight of the evidence. The court below accepted plaintiff's version and held that he was not guilty of contributory negligence; we cannot say this is manifestly opposed to the record.

It is argued that this was a pure accident in which defendant was free from any causative negligence. If, as the court evidently believed, defendant drove into the intersecting street, passing a standing street car on Lincoln avenue at a rate of twenty miles an hour, the proof of his negligence would seem to be sufficient.

No convincing reason appears which would compel a reversal. The judgment is affirmed.

AFFIRMED.

Natchett and Johnston, JJ., concur.

165 - 29254

43402

THE SHEAR COMPANY, a Corporation,
Appellee,

vs.

JAMES R. BAKER & COMPANY, a Corporation,
Appellant.

237 I.A. 631

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, James R. Baker & Company, from a judgment on a verdict in the sum of $1596 in favor of the plaintiff, The Shear Company, in an action for an alleged breach of contract by the defendant.

After the present appeal was submitted to this court a decision was rendered by the Third Division of this court in the case of W. L. Murdock Brokerage Company v. James R. Baker Company (No. 28339, not reported) which we regard as conclusive of the principal questions presented in the case at bar. The case of W. L. Murdock Brokerage Company v. James R. Baker Company, supra, involved a contract identical with the contract in the case at bar, and the evidence in the two cases is substantially the same in regard to the contract.

There are two questions, however, presented in the case at bar by counsel for the plaintiff, which were not raised in the case of W. L. Murdock Brokerage Company v. James R. Baker, supra.

The first contention is that evidence was admitted on behalf of the defendant under the general issue in regard to custom relating to the contract; and that when custom is introduced as an affirmative defense it must be specially pleaded. The second contention is that the reputed custom was not established by the testimony of experts.

The evidence in regard to custom related to a general custom and the general customary meaning of words and phrases in connection with the industry of catching and canning salmon. It is the rule that general custom and the technical meaning of words may be proved without being specially pleaded. Steidtmann v. Joseph Lay Co., 234 Ill., 84, 89; 27 R.C.L. section 42, p. 198.

A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general usage or custom relating to the business, and this is so whether he knew the custom or not. Steidtmann v. Joseph Lay Co., supra (p. 88). Evidence to explain words or phrases having a special meaning does not contradict or change a written contract. Steidtmann v. Joseph Lay Co., supra, (p. 88).

The cases of Leggat et al. v. Sands' Ale Brewing Co., 60 Ill. App. 156, 163, and Mobile Fruit & Trading Co. v. J. K. Judy & Son, 91 Ill. App. 82, 91, relied on by counsel for the plaintiff in support of their contention that in order to render evidence of custom admissible the custom must be specially pleaded, relate to a particular and not to a general custom.

Expert testimony is not necessary to prove custom. Any person who is familiar with the custom may testify. Wilson v. Bauman et al., 30 Ill., 493, 498; 27 R.C.L., section 42, p. 198; 17 C. J., p. 521.

We think that the evidence in the case at bar is sufficient to show that the witnesses who testified on behalf of the defendant in regard to custom were fully qualified. James H. Baker testified that he had been familiar with the catching and canning of salmon for twenty years. Lee Dinges testified that he had been in the canning business for twenty-two years and that he was familiar with the method of catching and packing salmon. H. H. Boswell testified that he had had experience in the salmon industry in Alaska since 1917 and was familiar with the catching and canning of sal-

men. Oscar A. Roenstrater testified that he had had experience in connection with the salmon industry since 1914.

Counsel for the defendant contend that the court committed reversible error in giving instruction No. 6, which in substance told the jury to find a verdict for the plaintiff if the jury believed that the plaintiff had proved its case as alleged in the declaration by a preponderance of the evidence. It is maintained by counsel for the defendant that the instruction ignored the defense of the defendant based on the proof of custom. We think that the contention of counsel for the defendant is correct. According to the rule such an instruction would have been justified in the case at bar only if the declaration had negatived expressly or by fair implication the defense of the defendant. Cromer v. Borders Coal Co., 246 Ill., 451, 455. The declaration in the case at bar did not so negative the defense of the defendant. Since the instruction was peremptory the error was not cured by any instructions given on behalf of the defendant. Cromer v. Borders Coal Co., supra, (p. 457); Cantwell v. Harding, 249 Ill. 354, 358.

For the reasons stated the judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

29985

ELI JEWELRY CO., a Corporation,
Appellee,

vs.

CITY OF CHICAGO, WILLIAM E. DEVER as Mayor of the City of Chicago, and MORGAN A. COLLINS as Superintendent of Police of the City of Chicago, (sued as Morgan A. Collins, Chief of Police of the City of Chicago),
Appellants.

237 I.A. 631

APPEAL FROM INTERLOCUTORY ORDER, CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order granting a temporary injunction restraining defendants from interfering with, or attempting to prevent complainant from selling, merchandise owned by it, at retail by the auction method. Complainant does not appear here to defend this injunction.

By the bill it is alleged that complainant is an Illinois corporation conducting a retail jewelry store in the city of Chicago and that it desires to sell its merchandise at retail by means of an auction; that it does not conduct an auction house or receive merchandise from any other persons to be sold at auction; that it does not make a universal practice of selling its goods at auction, but considers the method of selling by auction a more satisfactory way of selling its merchandise at retail during the holiday season, and that it intends to conduct such sale by auction through its regular salaried officers and employes; that it will sell only its own merchandise.

The delegation of powers to the city council is in section 1, article 5, of the Cities and Villages Act. Under the 91st clause the City is given power "to tax, license and regulate

auctioneers, ***" Under this the city has passed an ordinance to license and regulate auctions and auctioneers which defines an auctioneer as follows:

> "An auctioneer is one who sells goods at public auction for another or for himself. Any person who sells his own goods at a public auction or private auction is an auctioneer within the meaning of this ordinance."

Apparently the theory of the temporary injunction was that under the powers granted by the statute the City could license and regulate only auctioneers in the general business of selling goods at auction, and not auction sales by merchants of their own merchandise.

Does the power to license and regulate "auctioneers" include the power to license and regulate all sales at auction? In support of the affirmative defendants cite four cases, but examination of these shows that they do not support the defendants, but rather are contrary, for in each of these cases the distinction is recognized between the business of auctioneers and auction sales. In City of Goshen v. Kern, 63 Indiana, 468, the court had under consideration the power of cities "To regulate the sale of all kinds of property at auction in the streets, stores, shops, or elsewhere in the city, and to license auctioneers." It was there held that under the power to regulate auction sales an ordinance was valid which required a license to sell one's own goods by auction. The same distinction is in Fretwell v. City of Troy, 18 Kansas, 272, in which the question was the validity of an ordinance imposing a daily license fee for all sales at public auction. The other two cited cases are similar.

A municipality may exercise only such powers as are expressly delegated to it by the legislature and such as are necessarily implied from those expressly given. Potson v. Chicago, 304 Ill. 222. The power granted to municipal corporations must be

strictly construed. Any fair or reasonable doubt as to the existence of the power must be resolved against the municipality. Chicago v. Pettibone, 267 Ill., 573; Lowenthal v. City, 313 Ill. 190.

We are not in accord with the claim that the City has power to require a license fee for auction sales under the general police powers. These powers belong primarily to the state, and those delegated to cities can be exercised only in reference to the subjects and occupations, the regulation and control of which are by specific clauses expressly delegated to such municipalities.

There is an obvious difference between the general business of an auctioneer and the sale by a person of his own goods at auction. Neither expressly nor by implication does the power to license and regulate the former extend to and include control over the latter.

The temporary injunction was properly issued and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

29977

237 I.A. 631

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellee,

vs.

REBECCA HECKELMAN,
Appellant.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The complainant filed its bill of complaint on June 20, 1923, alleging that, on the 19th day of July, 1921, it issued a policy of insurance on the life of Nathan Heckelman for the sum of $1,000, payable upon proof of death of said Nathan to the defendant Rebecca Heckelman; that a written application for such policy was made by Nathan and Rebecca, in which they agreed that certain statements and answers contained in said application were true and should form the basis of the contract of insurance; that certain of these statements which were material were false and were known to be false; that the complainant, believing the same to be true, issued and delivered the policy of insurance on the faith thereof; and that, if it had known the same to be false and untrue, it would not have issued and delivered the policy.

The bill further alleged that on the 19th day of September, 1921, following the delivery of the policy, Nathan Heckelman died; and that thereafter the complainant discovered the falsity of these statements; further, that no letters of administration or letters testamentary had ever been taken out on the estate of Nathan Heckelman;

that the complainant was ready and willing and offered to return the premiums paid on said policy to the defendant or the administrator of said Nathan, if one should be appointed as the court might direct. It was also averred that Rebecca Heckelman had threatened to bring a suit on the policy against the complainant. The bill prayed for direct answer, the oath being waived; that the policy of insurance should be set aside and vacated and the defendant restrained from commencing or prosecuting any suit against the complainant upon the policy; and for other and further relief.

The defendant appeared and demurred to the bill.

October 23, 1924, an order was entered granting leave to file instanter an amended bill of complaint, and this was filed, setting up in detail the respects in which it was alleged that the representations made in the application for the policy were false and untrue; and that, on July 27, 1923, the defendant filed her suit upon the policy in the Municipal Court of Chicago; that she threatened to prosecute said suit unless prevented and restrained by the order of the court. The amended bill also averred that the policy was, by its terms, incontestable by the complainant after two years from the date of its issue, and prayed for an injunction restraining defendant's suit in the Municipal Court; and that the policy might be set aside and vacated and declared null and void and for further relief.

October 27, 1924, thereafter, on motion of the complainant, an interlocutory order was entered restraining the defendant, Rebecca Heckelman, from prosecuting her suit as prayed in the bill and from that order this appeal was taken.

The first contention of the defendant is that a court of equity is without jurisdiction to entertain a bill to cancel an insurance policy after the death of the insured upon the ground that it was obtained by false statements of the insured, and the case of Ben Haines Life Ins. Co. v. Reifert, 210 Ill. 157, is cited to this point. That such is the general rule in the absence of special and controlling circumstances must be conceded, and, as stated in that opinion "for the reason the insurance company has a plain and adequate defense at law to a suit upon the policy." However, in the original as well as the amended bill, facts are, we think, set up which distinguish this case from that case. These facts, as stated in the original bill, are to the effect that, while the complainant was ready and willing and offered to return the premiums paid on the policy, no letters of administration or letters testamentary had ever been taken out on the estate of Nathan Heckelman. While in the amended bill a further distinguishing fact is set up in that it is alleged that the policy is by its terms incontestable after two years from the date of its issue.

The defendant argues that this allegation as to the incontestability of the policy is nothing more or less than a conclusion formed in the mind of the pleader and based upon something that might or might not be contained in the policy. We do not agree with this contention. The question of whether a life insurance policy does or does not contain an incontestable clause would seem to be a simple question of fact which could be easily ascertained by an examination of the policy. We do not regard the allegation of the amended petition in this respect as a conclusion of law.

The defendant says that the allegations of the bill do not bring the case within the statute of this State because the bill does not allege that the policy was issued or delivered in this State, and further points out that the allegation of the bill as to the incontestability of the policy is not substantially the same as the present provision of the Statute (see Illinois Revised Statutes, 1921, chapter 73, section 378.) We think, however, both these points are immaterial. The validity of the policy would not in any way be affected by the fact, if it was a fact, that it was issued and delivered in New York or some other State. Neither would the liability of the complainant necessarily be determined by the provisions of the Statute.

The defendant, however, further contends that, conceding that the bill sets up special facts and circumstances which would take the case out of the general rule and give a court of equity jurisdiction, nevertheless, since the original bill was filed June 26, 1923, and the policy issued on July 19, 1921, it appears on the face of the bill that at the time the amended bill was filed, the complainant's right to contest its liability under the policy had been barred by the provisions of the policy itself.

The theory seems to be that the original bill stated no cause of action; that prior to the filing of the amended bill the time within which (according to the terms of the policy) the complainant might bring a bill for rescission had expired. Therefore, by analogy to the well-established rule at law as to Statutes of Limitations, the cause of action set up in the amended pleading is barred. Eylenfeldt v. Illinois Steel Co. 165 Ill. 185; Mackey v. Northern Milling Co., 210 Ill. 115, and other well-known cases are cited in support of

this point.

We do not think it can be said that the original bill in this case failed to state a cause of action or that the amended bill states another and a different cause of action. That transactions which involve a liability under policies of insurance are essentially different from other contracts seems to be established in Bonjhan v. Metropolitan Life Insurance Co., 285 Ill. 136; Ramsey v. Old Colony Life Insurance Co., 297 Ill. 592; Powell v. Mutual Life Ins. Co., 313 Ill. 152. The court in these cases distinctly holds that an insurance company seeking to avoid its responsibility to the beneficiary for the reason that the policy was obtained by fraudulent representations must, in cases where the policy contains a non-contestable clause, take affirmative action in court within the time limited in the policy, in order to avoid its liability, and we think that the filing of such a bill within the time named in the incontestable clause of the policy amounts to such rescission whether the bill does or does not allege facts sufficient to justify the relief prayed for. At any rate, since this order is only interlocutory, we think it was not error to issue an injunction restraining the suit at law until such time as the case might be heard upon its merits.

For the reasons indicated, the order of the Superior Court will be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

39613

BENJAMIN FISHBAIN,
Appellee,

vs.

CITY OF CHICAGO, a
Municipal Corporation,
et al.,
Appellants.

237 I.A. 631

APPEAL FROM INTERLOCUTORY ORDER,

CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the City of Chicago, the Mayor of said city, and other of its officials, from an interlocutory order of injunction in and by which said city and officials were enjoined from interfering in any manner with the construction of an incompleted portion of an addition to the building on premises known as 4250-4252 West Lake street, in said city, county, and state.

The defendants, who are appellants here, filed a general demurrer to the bill of complaint, and the injunction thereupon issued. The complainant has not appeared in this court to support the order entered.

The complainant in his bill alleges that he has for more than eight years owned the premises described in fee; that these premises have a frontage along Lake street of about fifty feet in width and a depth of about 135 feet, to an alley in the rear of the premises, the alley being about eighteen feet wide, Lake street being a public thoroughfare running east and west, and used as a car line by the Chicago Surface Lines; that the premises are about the middle of the block on the north side of Lake street, between the intersection of Kildare avenue and Keeler avenue, which are both public highways running in northerly and southerly direction and intersecting Lake street; that Lake street, between these two avenues, is improved with buildings

occupied for business purposes as distinguished from residential purposes, and has been designated by the City Council of the City of Chicago for commercial purposes; that the premises are improved with a modern two story brick building which is about 48 feet wide and 85 feet long, and the first floor of this building running on Lake street is used by complainant as a work shop and a salesroom, and the second floor for his residence, which he has occupied for about eight years; that complainant has been engaged in the dry cleaning, cleaning and dyeing business for a period of about fifteen years, and, as a result of his efforts, has built up a large and lucrative business; and that the building on the front portion of the premises has become inadequate and insufficient to enable him to profitably conduct this business; that there is no gasoline or benzine stored or used in any portion of the building occupied by him or any part or portion of the building recently erected on the rear of the premises, nor will there by any gasoline or benzine stored in either of said buildings; that it is his intention to store the benzine and naptha used in the business in tanks laid under the ground and connected by pipes to the respective machines in which the naptha or benzine is to be used, and also to the room in which the same are to be used; that he has begun the erection of a building in the rear of the premises to be used in connection with his cleaning and dyeing business and has expended the sum of $18,000 in and about the erection of the same; that work remains to be done in the way of putting on a roof, putting in doors, etc.; that the boiler is not completed, and the work yet to be done will cost approximately $3,000; that he has an investment and a property right as set forth of about $18,000, which, if he is not allowed to complete, will be an irreparable loss to him; that the winter is coming on and that the pipes, if

not protected, will freeze; and that if the roof is not allowed to be put up, it will work irreparable injury to the balance of the building.

The bill further alleges that this building, thus being erected, is for the purpose of a boiler room to be used in connection with complainant's said business; that, when completed, it will be a fireproof room and will in all respects comply with the ordinances of the city; that his business is lucrative, is constantly increasing, and that he has expended large sums of money in the development of it; that his present facilities are inadequate, and that if he is not permitted to use and occupy the building now being erected, it will be impossible for him to expand and develop his business or to carry on his present business expeditiously. Further, that, until a final hearing of the cause he does not desire to operate the building now being erected, but only to complete it so as to safeguard the work and the money already expended; and that it will be inequitable to deprive him of his property right in the investment already made.

The bill further avers that the defendants and their agents, through the Police Department, have threatened to arrest complainant or any of his architects, superintendents or workmen who might attempt to do any work upon this building; that, as a consequence, no work is being done thereon, to complainant's irreparable injury; and that unless a temporary injunction is issued, irreparable injury will result.

The bill further avers that complainant invokes the aid of equity "purely for the purpose of protecting his property rights;" that he has complied with all the lawful ordinances of the City of Chicago and has made application for a permit to erect

said building; that said permit has been disapproved by the officials of the Fire Prevention Bureau of the City of Chicago for the reason that the same is not in compliance with the fifty foot ordinance clearance to other property; that said Bureau and the Police Department of the City have threatened him and forbade his conducting his dry cleaning business therein, and have threatened to imprison him if he undertakes to conduct the said business; that said officials presume to act by virtue of a certain ordinance creating a Bureau of Fire Prevention and Public Safety as amended June 25, 1917, designated as Article 13, Sections 1412 to 1421, inclusive, which said sections of the ordinance the bill sets up in haec verba.

The bill also avers that in compliance with Paragraph "A" of Section 1416 of said ordinance, complainant procured written consent of the majority of all of the property holders, according to the frontage of both sides of the street around him, the block or square in which his premises are located; that his dry cleaning business and establishment represents an investment of a large sum of money, about $30,000; and that unless he is permitted to operate said new building, he will suffer irreparable damage and injury, in that the said premises are especially adapted and suitable for the purpose of a dry cleaning establishment and for no other purposes whatsoever.

The bill further avers that sections 1412 to 1421, inclusive, of Article 13 of these ordinances, are invalid by reason of the fact that the City of Chicago is without power to license, regulate, control or locate the business of dry cleaning, and that said sections are an attempt on the part of the City of Chicago to regulate, license, control and locate dry cleaning establishments without power therefor either expressed or implied;

and that, although complainant has seen fit to comply with section 1416 of said Article 13 of the ordinance, he represents that said section is unreasonable, invalid, and unconstitutional, in that it requires the written consent of the majority of all the property owners according to frontage on both sides of the street surrounding such block or square, in which two-thirds of the improved property, according to the frontage on both sides of said street surrounding said block or square is used exclusively for residential purposes; and that the said limitation is unreasonable and arbitrary.

It is further averred that Section 1416 of said Article 13 is further unreasonable, invalid, and unconstitutional in that it requires that every building used for dry cleaning purposes shall be at least fifty feet from any other building or structure or to the line adjoining property which it may be built upon, and the said limitation being enforced would prevent the establishment of a dry cleaning plant within the limits of the City of Chicago, and would drive said business out of existence.

It is averred that there are at present more than ninety dry cleaning establishments within the limits of the City of Chicago, and that not one of said dry cleaning establishments now in existence conforms with the said fifty feet requirement; that this requirement is unreasonable, arbitrary, and unconstitutional; also, by reason of the fact that the boiler room of complainant is a fireproof construction and so equipped that in case of fire it can be readily extinguished; that in the operation of a boiler room no offensive or noxious fumes, odors or noises are emitted; and that a dry cleaning department is not unwholesome or in any way nauseous; that dry cleaning is not a nuisance, and that the business of dry cleaning is entirely lawful and unharmful.

It is further alleged that said Sections 1412 to 1421 exempt dry cleaning establishments in existence at the time of the passage of the ordinance and is discriminatory and in violation of the due process clause of the constitutions of the United States and of the State of Illinois.

Such are the material averments of the bill. It will be noticed that it does not allege that the whole ordinance in question is invalid, but only asserts that certain sections thereof are invalid.

We regret the necessity of deciding this case without the benefit of a brief on the part of the complainant. Nevertheless, we think the law which must be applied is not doubtful. That the City of Chicago has power to enact reasonable regulations applicable to the business in which the complainant is engaged under the provisions of Paragraphs 61, 62, 63, 65, 66 and 100 of Article 5 of the Cities and Villages Act, is, we think, clear and has been settled by numerous decisions of the Supreme Court. City of Chicago v. Mandel Bros., 264 Ill., 306; Williams v. City of Chicago, 266 Ill. 267; Hartman v. City of Chicago, 242 Ill. 511; Washingtonian Home v. City of Chicago, 238 Ill., 206. And even if certain specific provisions of the ordinance should be held to be invalid (a question which we do not think it necessary for us to decide on this record) nevertheless, if the intention of the Common Council as may be gathered from the reading of the entire ordinance, is that the ordinance might be given effect without the invalid portions, it will be so construed. People v. Chicago Hyd. Co., 270 Ill. 278; Village of DePue v. Bumgarner, 273 Ill., 574; Consumers Co. v. City of Chicago, 308 Ill. App. 203; Pochon v. Illinois T. R. R. Co., 210 Ill. App. 392. That this was the intention of the council in the enactment of the ordinance set up is plain from a reading of it and a consideration of the subject

matter with which it deals.

Such being the case, the injunction should not have been granted for the reason that complainant had an adequate and complete remedy at law concerning the matters of which he complains.

It is only necessary in this connection to repeat what this court has recently said in the case of Film Classics of Illinois et al., Appellees, v. Wm. E. Dever, Mayor of the City of Chicago, et al., Appellants, general number 29936, not yet reported: "It is the established rule in this state that when the remedy of mandamus is available, a court of equity has no jurisdiction and that allegations of irreparable injury and hardship do not in any wise change this rule. Among the cases holding that mandamus is the proper remedy in a case like this are Grace Church v. City of Zion, 300 Ill., 513; Hamilton v. City of Chicago, 227 Ill. App. 291; Ft. W. & C. Ry. Co. v. Chicago, 159 Ill., 369; Klingsmith v. Harrison, 18 Ill. App. 487; City of Chicago v. O'Hara, 124 Ill. App. 294; Chicago, B. & V. R. R. Co. v. Mt. Anne, 181 Ill., 151; Vitagraph Co. of America v. City of Chicago et al., 209 Ill. App. 561."

For the reasons indicated the order of the Circuit court will be reversed.

REVERSED.

McCurdy, P. J., and Johnston, J., concur.

29976

PEOPLE OF THE STATE OF ILLINOIS,
On the Relation of JOHN ERICKSON,
Petitioner vs. Relator
vs.
DAVID M. BROTHERS, a Judge of the
Circuit Court of Cook County.
Respondent.

PER CURIAM.

This is an original proceeding in this court whereby the relator, who was the plaintiff in an action in tort brought against one John Sullivan as defendant in the Circuit court of Cook County, asks that David M. Brothers, a judge of the Circuit court of Cook County, (who presided at the trial of said cause before a jury in the Circuit court) shall be required to sign a bill of exceptions in that cause and enter an order permitting the filing of said bill of exceptions.

The petition also asks that the said judge of the Circuit court should expunge from the record a certain order entered in that cause on October 4, 1924. The respondent has appeared in this court and filed his answer, various orders have been entered, and the matter is now at issue.

The material facts appear to be that the cause was tried by a jury and a general verdict returned for the plaintiff there, relator here, Also, in response to an interrogatory, the jury returned a special finding to the effect that the injury was inflicted wilfully and maliciously.

The defendant in the Circuit court made a motion to set aside and vacate this special finding, which was allowed, and judgment was entered on the general verdict. From this order, setting aside the special finding, the plaintiff prayed and was allowed an appeal upon the filing of bond, which bond was filed

and approved July 28, 1924. The plaintiff in that suit, relator here, presented the bill of exceptions to the respondent judge on September 24, 1924, within the time limited for presenting it. Action thereon was continued to September 27, 1924, and again until October 4, 1924. On this last date the judge, apparently on his own motion, entered an order that the judgment which was entered on the general verdict on June 5, 1924, should be vacated and set aside and expunged from the records of the court. This last named order recites that the order of June 5 "was erroneously and mistakenly entered by the clerk of this court," and from this order also the plaintiff prayed an appeal to this court, which was allowed upon filing bond in the sum of $200.

The bill of exceptions which the trial judge was requested to sign contains the motion of defendant to vacate the judgment rendered on June 5, 1924, and to set aside the verdict of the jury and the special interrogatory and answer to the same.

The answer of the respondent admits that the order of October 4, 1924, as set forth in the petition was made, but inadvertently, and the respondent further denies that the purported bill of exceptions presented to him for signature was fair and true. In particular he denies that any exception was taken by counsel for the relator to the entry of the first order of July 7, 1924, vacating and setting aside the judgment based on the special interrogatory and answer of the jury thereto.

The trial judge claims to have a definite and distinct recollection that no exception was taken by counsel for the relator, and this seems to raise the material issue of fact between the parties to this proceeding.

The record shows, however, that at the time the special finding was set aside the relator at once prayed an appeal, which was allowed, and the pleadings further indicate that

at the time the bill of exceptions was presented to the trial judge he did not object to it upon the ground now stated. We believe it is generally true that nisi prius judges are quite liberal, (as they ought to be) in the matter of exceptions; and the recollection of the trial judge, on October 4th thereafter, of the supposed negative fact that no specific exception was taken several months prior thereto, can hardly be considered controlling in view of the fact that an appeal was allowed by him as shown by the record from the very order concerning which it is now said no exception was taken. It may, indeed, be a question (although we do not think it necessary on this record to decide it) whether a formal exception was necessary in order to preserve the ruling of the court for review. Patting v. Spring Valley Coal Co., 98 Fed. 811; State of Illinois v. Stern, 207 Ill. App. 154; Green v. Stritmatter, 183 Ill. App. 25. However this may be on the issue of fact, we think the finding must be for the relator, and a mandamus directing that the bill of exceptions as presented shall be signed and an order that it be filed in the cause entered will accordingly issue.

MANDAMUS AWARDED.

140 - 29556

237 I.A. 632

IDA MARKS,
Appellee,

vs.

SONS AND DAUGHTERS OF ABRAHAM,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant seeks to reverse a judgment against it for $497, the amount found to be due the plaintiff upon a membership insurance certificate issued by defendant to plaintiff's husband, who died on February 12, 1923. Defendant contends that he was suspended for non-payment of dues fifteen days before his death and was not reinstated.

The certificate states that it is "issued to Ludwig Marks upon the condition that he will comply with all laws and rules and regulations that now govern and which may hereafter be passed" by the lodge; that he "agrees to make timely payments as required by the laws of the Lodge, in default of which he shall stand suspended and stricken from the roll of membership ipso facto;" and that "upon compliance in all particulars, with the laws of the Lodge, the beneficiaries of the member shall, upon death, * * receive five hundred dollars." By an amendment to the by-laws passed after this certificate was issued, it was provided that upon the death of a member, defendant should pay to his or her lawful heirs the sum of $500, "providing he or she was a member for six months or more and in good standing sixty days prior to the death."

The by-laws fix the amount of "the regulation dues for every male member" at one dollar a month, payable "monthly in

advance." The record shows, however, that for several years prior to his death, Ludwig Marks never paid his dues "monthly in advance," but always paid after several months' dues had accumulated, and such payments were accepted by defendant. In the year 1917, he made four such payments; in 1918, three; in 1919, two, in March and in August; in 1920, two, in January and June; in 1921, three, in January, June and November; in 1922, three, in March, in August, and in November. The last payment, made on November 26, 1922, covered everything that was due up to the end of that month, and was paid by the son of the insured on behalf of his father who was then confined to his home. The son testified that he received a statement from defendant showing that his father owed six dollars for dues to November 30, 1922, and an assessment of $10.90, with a note at the bottom of the statement reading as follows: "If not paid by 11/11 suspension will follow;" and that he had been in the habit of making payments for his father and had paid the same whenever his father received a bill from defendant.

One of defendant's by-laws provides that "any member who has not paid his or her dues, fines or other extra assessments for one month shall be notified by the finance secretary through the mails by registered letter, that in case he or she fails to liquidate such indebtedness at the following meeting he or she shall be stricken from the roll of membership;" and that if such member pays his arrears in full within thirty days after suspension he shall be reinstated upon a "two-thirds vote of the house." The notice sent to the deceased in the early part of November, 1922, was evidently mailed to the insured in pursuance of this provision of the by-laws; and it is also evident that because of the son's payment of the amount then due, the insured was not then suspended, although the dues were not paid monthly in advance.

Defendant introduced the minutes of a meeting of the defendant society held on January 28, 1923, in which it was stated

that "it having been reported that Ludwig Marks was in arrears," he was ordered suspended. At that time the dues of the insured, for December, 1922, and January, 1923, had not been paid, and no notice had been mailed to him by the finance secretary "that in case he fails to liquidate such indebtedness at the following meeting, he would be stricken from the roll of membership," as required by the by-laws.

It thus appears that while the membership certificate ostensibly makes such a non-payment "ipso facto" a suspension, the amount of the certificate is nevertheless made payable at the death of the member if he has fully complied with the by-laws, which clearly contemplate that a notice shall be sent by registered mail to a member in arrears before he can be lawfully suspended, and no such notice was given. The order of suspension entered on the minutes on January 28, 1923, without such notice, was unauthorized by the by-laws and did not deprive the insured of his standing as a member. The insured, therefore, was "in good standing sixty days prior to his death" and by the express terms of the by-laws his heirs were entitled to the payment of $500, less $3, the amount of dues unpaid when he died.

Furthermore, upon the undisputed evidence as to the course of conduct between the insured and defendant as to the payment of dues, we think defendant had waived the requirement that such dues must be paid monthly in advance and is now estopped from insisting upon the forfeiture claimed, even if the by-laws did not require notice to the insured before he could be suspended. It was so held in Hartford Life Ins. Co. v. Unsell, 144 U. S. 439, which was followed in Conductors Benefit Ass'n. v. Tucker, 157 Ill., 194, where the principle was held to apply to mutual benefit societies.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

98 - 29507

MARGARET POWERS McLAUGHLIN,
Appellant,

vs.

KATE HAHN et al.,
Appellees.

237 I.A. 632

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a partition suit brought by Margaret P. McLaughlin for the division of certain real estate which she and appellants, Ellen P. Guerin and Kate Hahn, defendants to the petition, inherited in equal shares as the only heirs at law of Robert F. Summers, deceased. After entry of the decree and a hearing on whether solicitors' fees should be taxed as part of the costs, the court entered an order finding "that this proceeding has not been an amicable one, and that it would not be equitable to require defendants to contribute toward the payment of solicitors' fees."

The court also found in its decree that all material allegations of the bill were proved and are true, and that the rights and interests of all the parties in interest were correctly set forth in the bill for partition, and that no good and substantial defense thereto was interposed by either of the defendants thereto.

Said Kate Hahn and Ellen Guerin filed like answers and a cross bill, both of which admitted all of the material allegations which entitled complainant to a partition in accordance with the prayer of the bill and as decreed by the court. While the court refused to strike the cross bill, yet the court found in its decree that the cross bill set up

no new matters and asked for no relief which was not equally available in the original bill and answer thereto and dismissed the same for want of equity.

The sole question presented is whether the court should have taxed complainant's solicitor's fees as a part of the costs.

It is first urged by appellant that as the original petition properly set forth the rights and interests of all the parties in interest, and no good and substantial defense to the bill was interposed by any of the defendants, the court was required by statute to make an allowance for reasonable solicitor's fees for complainant's solicitor and apportion the same according to statute. It is insisted by appellant that the statute in this respect is mandatory, it providing that "the court shall apportion the costs," etc. A similar contention was made in McMullen v. Reynolds, 209 Ill. 504. The court there did not agree with the contention and reviewed previous decisions where the court had held in effect that it would be inequitable to require defendants to pay part of complainant's solicitor's fees "where the solicitor of complainant represented only the complainant's interest and assumed an attitude hostile in its character toward the defendants, whereby it became necessary for them to employ counsel in order to protect their interests and to obtain a just partition of their lands." Many of those decisions were under prior acts which provided that the court "may apportion," or that "it shall be lawful" to apportion solicitors' fees in such a proceeding. We deem it unnecessary to discuss or attempt to distinguish those cases, for from them the Supreme Court in Hynes v. Jennings, 263 Ill. 363, deduces as a guiding rule that "when the bill clearly sets up the rights and interests of the parties, and the suit is an amicable one, the statute authorizes the taxing of a fee, but where the

complainants' attitude toward the defendants is hostile, so that defendants are required to employ counsel to protect their interests, it would be inequitable to make them also pay complainants' solicitors' fees."

It would, therefore, seem necessary merely to test the record before us by such rule.

It is not questioned that the bill clearly and properly sets up the rights and interests of the parties, and it only remains to determine whether the suit was an "amicable" one, or whether the complainant's attitude toward the defendants was "hostile, so that defendants were required to employ counsel to protect their interests."

It would extend this opinion to an unreasonable length to attempt to state the various circumstances under which the courts have held the proceedings not to be amicable, and when the attitude of complainant's solicitor is regarded as "hostile." Suffice it to say that it is clearly deducible from most of the cases that the word "amicable" in most instances denotes an absence of a controversy in a legal sense, and of facts or circumstances which justify employment of counsel by defendants to protect their interests. The courts have frequently referred to a suit as "not amicable" when it was a contested suit, implying generally that to render it so there must be a legal controversy, or such a hostility as might affect the defendants' interests if not duly guarded. In Stenger v. Edwards, 70 Ill. 631, it was held where the suit is an amicable one, a solicitor's fee may be taxed as costs, but not if there is a contest. And in Hartwell v. DeVault, 159 Ill. 335, the court said: "The proceeding has not been an amicable one, but hotly contested by the parties." (p. 337) In the McMullen case, supra, complainant's counsel sought an

unfair advantage for his client, thus indicating a hostility towards defendants which justified the conclusion that it was necessary for defendants to be represented by their own counsel to protect their rights and obtain a just partition.

The question arises, therefore, whether the proceeding at bar could properly be denominated as not an amicable one, or whether there was any hostility suggesting the necessity of defendants procuring their own counsel.

The record discloses that there was some ill-feeling between the parties or their counsel which arose mainly over an unwillingness of defendants to comply with the request of complainant's counsel that each of them pay one-third of $300 as a fee for his services in the administration of the estate. It also appears there was some talk with reference to an amicable division of the real and personal property of the estate of said Summers, deceased, but that the parties never reached an agreement. There was also conflicting testimony as to whether or not there was an agreement that no bill for partition should be filed, and we are impressed that the ill-feeling growing out of these differences, which had no direct bearing upon the merits of the partition suit and presented no legal controversy to be adjusted therein, served to furnish a pretext for setting up immaterial issues in the answers and the cross bill, apparently for no other purpose than to defeat complainant's claim for the inclusion of her solicitor's fees in the costs. But mere ill-feeling growing out of such differences is not sufficient of itself to warrant finding that the suit was not amicable. (Gazel v. Gazel, 122 Ill. App. 129.)

Nor do we find in the record any evidence of hostility toward defendants which required them to procure counsel for the protection of their interests. As confirmed by the decree

complainant's bill set forth their rights and interests correctly, and there was nothing in the attitude of her or her counsel, before or during the proceeding, which indicated a disposition to take any unfair advantage of defendants in the division of either the personal or real estate.

Nor from an examination of the pleadings and evidence do we find any real "controversy in a legal sense." (Whelland v. Byram, 240 Ill. 472.) It was said in Mathewson v. Kohn, 164 Ill. 495: "It is evident that the good and substantial defense which may be interposed and which will prevent the allowance of a fee is a defense of a good and substantial character." In the case at bar the court held that the defense was not of that character.

It remains, therefore, to consider whether the nature of the defense sought to be made in answer presented a legal controversy. From a critical examination of the pleadings we think it may be said that most of the averments upon which defendants make the pretext of a defense might well have been disregarded and expunged from the answer and a decree have been entered upon the petition and admissions in the answer. After the answer admitted the essential averments of the petition as to the rights and interests of the parties it made only two denials, one, of the unnecessary averments in the petition (Bevan v. Bevan, 164 Ill. App. 387) that defendants refused to comply with complainant's request for a voluntary division of the real estate, and the other, a denial that complainant was entitled to have her solicitor's fees assessed and allowed, although there was no allegation with regard thereto in the bill but simply a prayer to that effect.

The answer then proceeded to make the following immaterial averments. First that the parties entered into an oral agreement that no bill for partition should be filed. While

such averment, if true, constituted no good and substantial defense to the bill, and as an oral agreement, pertaining as it did to real estate, could not be enforced, the averment was probably intended to furnish a basis for the claim that the proceeding was not an amicable one. As before stated, while such agreement was talked about the testimony is so conflicting that it is not clear that the parties arrived at any definite understanding. As defendants afterwards filed their cross bill, asking for partition they are hardly in a position to complain of complainant's bill on the ground of such an agreement. The averment was wholly immaterial as a defense.

It is next averred that two persons, included among the defendants to the bill, are in possession of certain parcels of real estate, but that the nature of their tenancy is unknown to the defendants. There was no attempt to prove the nature of their tenancy, and its immateriality may be inferred from the fact that it is alleged in the cross bill that they were tenants from month to month. The objection seems to be a frivolous one. Another immaterial averment was that the administrator with the will annexed of the estate of said Summers was not made a party defendant. Unless the personal property was insufficient to pay the debts of the deceased, and no such claim was made, it was unnecessary to make him a party in such capacity. (Stallard v. Brown, supra; Bigus v. Schmer, 277 Ill. 168, 174.) It was also alleged that said administrator, either as such or as an agent for complainant, had collected rents from the real estate and had failed to account for the same. But there are not only no averments from which such an accounting could be asked for from complainant, but an accounting has no necessary connection with the partition of land. (Stallard v. Brown, supra.) Another averment was that Summers at his death, was also possessed of a

certain lot 6. The proof showed that he was not, but that the lot had been deeded to one Pecchia. Even if the lot had been a part of the real estate left by Summers it was not necessary that it should be included in the bill for partition. Fread v. Hong et al., 133 Ill. 233; 30 Cyc. 153.) The omission to mention such lot, therefore, would not have been an error of description even had it been included in the real estate left by the deceased.

The answer then proceeds to state that the complainant has failed and neglected to set forth in the petition (1) the names of the tenants or the character of the tenancy (and there was no attempt to prove there were any); (2) to set forth all the property owned by said Summers at the time of his death (referring presumably to said lot 6); (3) to show the exact nature of the interest of defendant Pecchia in a certain lot 7, which the bill alleged was under a contract of sale from said Summers to said Pecchia, and which was proven to be the fact. (If there was such an agreement the lot could not be properly included for partition, and if there was not it would be properly included. The proof, however, showed there was such an agreement); (4) to show adjudication of claims, if any, in the estate and whether inventories were properly filed in the Probate Court, and to make claimants or creditors, if any, parties defendant - all of which is immaterial unless it was averred that the personal property of the estate was insufficient to pay the debts.

We cannot but regard these various averments as frivolous and as merely intended to give the impression of making a defense so as to prevent the allowance of solicitor's fees. None of these averments raises a legal controversy or presents a good and substantial defense.

As, therefore, there was no denial that the rights and interests of all the parties in interest were not correctly set forth in the bill for partition, and as the court decreed that they were correctly set forth and that no good and substantial defense was interposed, and as there was no evidence of a disposition or attitude on the part of complainant or her counsel not to accord to defendants the same rights she sought under the statute for herself, we fail to see that any legal controversy was raised by the answer or that any hostility existed which required defendants to employ counsel to protect their interests, or that there was any state of facts which would justify denominating the suit as not an amicable one, or holding that it could be inequitable to tax complainant's solicitor's fees as part of the costs.

Accordingly the order will be reversed with directions to include such fees as part of the costs of the suit.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch, P. J., and Gridley, J., concur.

114 - 20523

434 a

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. Robert E. Crowe, State's Attorney,
Defendant in Error,

vs.

ARTHUR GEORGE HUBERT,
Plaintiff in Error.

237 I.A. 632

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted and sentenced for a violation of the Illinois Securities Law. The information is in four counts and charges him and other defendants, named as officers, directors, trustees and agents of The Pandora Mfg. Co., Ltd., a common law trust, with (1) unlawfully offering for sale securities defined by said law as Class "B" Securities, to-wit, beneficial interest shares under said company; (2) unlawfully selling such shares to Martha C. Hallock; (3) the unlawful sales of said securities to said Hallock and divers other persons, and (4) authorizing and assisting in unlawful sales of such securities.

Several points urged for reversal need not be discussed. As to the alleged unconstitutionality of the law on which the information is based, not only is the point waived by coming to this court, but the law has already been held to be constitutional. (Stewart v. Brady, 300 Ill. 425; People v. Lee, 311 Ill. 882). As to the point that the charge is not sufficiently certain and specific to enable plaintiff in error to prepare fully for his defense and to plead the judgment in bar to any subsequent prosecution for the same offense, it is enough to say, in the absence of any attempt to point out in what respect there is uncertainty or insufficiency, that we fail to find grounds for the contention.

But an examination of the evidence leads to the conclusion that plaintiff in error's contention that the evidence is in-

sufficient to sustain the conviction is well taken.

While we think there can be no question that the certificates or shares of beneficial interest in a common law trust, such as the Pandora Mfg. Co. Ltd. is conceded to be, are included in the term "securities" as defined by section 2 of the Securities Act (Cahill's Stats., ch. 32, par. 255), and that a common law trust is amenable to the provisions of said act, as has been held in this State, (Kinross v. Cooker, 224 Ill. App. 111) and as like statutes have been construed in other jurisdictions, yet we fail to find sufficient evidence to justify a finding of plaintiff in error's guilt of a sale, or offer of sale, of certificates under said trust or of guilty accessoryship thereto, as charged in the information. While there is some evidence from which an inference of guilt might be drawn, yet we think it is altogether too weak to support a criminal conviction.

It is true that plaintiff in error helped to organize said common law trust and was one of its board of trustees and treasurer, and that the certificate stock book was for a time kept in his office, from which certain certificates of beneficial interest, appear to have been made out and signed by S. J. Trumbo as president, and Mrs. Hulbert as secretary. Many of such certificates attached to the stubs of the certificate book were introduced in evidence purporting to be issued to certain named individuals, most of which are marked as "cancelled," and with reference to which there was no proof of either delivery or sale.

It appears from the instrument of trust that Trumbo, the first president of the company, was alloted all of its entire 100,000 beneficial interests shares in two certificates, No. 1 for 76,000, and No. 2 for 24,000, and that the latter certificate was turned back into the treasury, and that there were several certificates purporting to be issued from said certificate No. 2. These

several certificates appear to have been once detached from the stubs, and most of them later re-attached and cancelled. There was, however, no proof of any actual sale to any of the persons named in any of the certificates so cancelled or of any transactions with them, nor to persons named in the stubs of certificates that were missing and unaccounted for, except the sale to Miss Martha C. Halleck of two hundred shares, and what was claimed to have been a sale to Mrs. Whitlock, and also a sale to Mrs. Weir. There was no proof tending to explain the issuance of certificates to any other persons than these three parties except the original transfer of all the certificates to Trumbo in payment of the assets of the trust.

The proof of sale to Miss Halleck was merely to the effect that some time after she purchased the stock through other parties she had a talk with Hulbert, who admitted that he had received several months afterwards a portion of the purchase price realized from her note given therefor. There was no proof connecting Hulbert with the sale or showing that he had any knowledge thereof until long after it was made.

As to Mrs. Whitlock, to whom certain shares were issued, her testimony with regard thereto is very contradictory. She appears to have been president of a garment company, and it was inferable from the evidence that the patents or business sold by Trumbo to the trust related to garments. She became interested in the Pandora Mfg. Co. through Dubois, one of the trustees and a defendant to the information, (whose conviction appears to have been set aside for some reason) who brought her a certificate for 5,000 shares and asked her to help finance the company either by discounting its notes or buying shares therein. That was in April, 1922. Such a certificate appears in the stock book as cancelled

April 25, 1922. She appears to have become president of the company about that time and was instrumental in bringing about an agreement dated April 6, 1922, between a brokerage concern by one Doan, its president, and the board of trustees of said company, whereby the brokerage concern was to dispose of 15,000 beneficial interests in said company upon a commission. While said agreement was signed by Hulbert and others as the board of trustees it does not appear that any sales were made or offered to be made by said brokerage concern for the trust company or that anything was done under the agreement except to take the stock back over to Doan's office so that he could fill out certificates signed in blank. Whether any such certificates were sold and delivered does not appear. Mrs. Whitlock claimed in her testimony that her dealing was with Trumbo and consisted of the purchase of one-half of the patents, or, as she states in another place, one-half of his beneficial interests, but that she never received a certificate therefor. No certificate appears to have been issued to her except that for the 5,000 shares given to her by Dubois if she would act as president of the trust, and for which she paid nothing. While she claims to have paid Trumbo $5,000 or more, who held beneficial interests in his own name, which seem from her testimony to have been the subject matter of their agreement whatever it was, yet for aught that appears to the contrary, such money was not paid for treasury stock or interests, and no proof was made of any sale of certificates to her which Hulbert promoted or of which he had any knowledge.

The only proof of an alleged sale consisted of a certificate issued to Mrs. Mary Weir for 100 shares, signed by Trumbo as president, and Mrs. Hulbert as secretary, which bore the same date as a certain document also introduced in evidence stating that in consideration of a certain investment made by her

in the sum of $500 in said company a majority of the trustees agreed that she "shall be in charge of the introduction of the Pandora garment in the Dominion of Canada when the time arrives for its introduction therein." Hulbert was one of the trustees who signed the document. There was no proof, however, that she paid the $500 or that such certificate was ever delivered or that anything was done under said agreement.

There is some basis, however, for the inference that the investment referred to in the agreement was the issuance of 100 beneficial shares, and that such a certificate was, as appears from a stub of the certificate book, made out by somebody, and that Hulbert by signing the agreement had actual knowledge thereof and was a party thereto. Neither Mrs. Weir nor anybody else testified to the transaction. In the absence of further testimony to show that a sale or offer to sell was actually made we think a conviction should not rest upon the bare inference alone. Notwithstanding unfavorable inferences that may be drawn from the testimony we do not think there was that quantum of proof which would justify us in sustaining the conviction.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

4 3486

123 - 29533

237 I.A. 632

MARY SREBEI, Plaintiff in Error,	ERROR TO
vs.	SUPERIOR COURT, COOK COUNTY.
GARDEN CITY SAND COMPANY, a corporation, Defendant in Error.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The sole question presented on this appeal is whether the court erred in directing a verdict for defendant at the close of plaintiff's case.

The action is one to recover damages for a personal injury. The declaration charges both ordinary and wilful and wanton negligence.

Plaintiff's evidence disclosed that she and other women on leaving a cement plant where they were employed were invited by the driver of defendant's truck, which had just been driven out of the plant loaded with bags of cement, to get on the truck; that they got on, some sitting on the seat with the driver, and plaintiff on a cement bag back of the seat; that after a ride of some two miles, at a point near her home, the driver stopped the truck, and requested the women to alight; that plaintiff was the last to get off; that as she attempted to alight, she took hold of a stake of the truck and stepped down on a step of the truck, and while one foot was on the step and the other on the ground, the truck started up causing her to be thrown so that the rear wheel passed over and crushed her right leg, necessitating its amputation.

The evidence of plaintiff tends to show that when the driver started up the truck he was looking toward plaintiff and could see her alighting therefrom, thus presenting circumstances for a jury to say whether he was chargeable with knowledge that she was in a position of danger at the time he started the truck, and whether starting it under such circumstances was a wilful and wanton act. Defining a wanton act our Supreme Court has said:

> "An intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make a case of constructive or legal wilfulness such as charges the person whose duty it was to exercise care with the consequences of a wilful injury." (Waldron Express Co. v. Krug, 291 Ill. 472, 477.)

And again:

> "Ill-will is not a necessary element of a wanton act. To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury." (Janesary v. C. & I. Traction Co., 306 Ill. 392.)

Giving such testimony the most favorable interpretation for plaintiff, as must be done,(Yess v. Yess, 256 Ill. 414; Waldron Express Co. v. Krug, supra.) it had some tendency to show that the driver started the truck while he had actual or constructive knowledge that plaintiff was at that time in a position of danger, and such absence of care as exhibited "a conscious indifference to consequences," thus requiring submission of the case to the jury on the issue of wilful and wanton injury.

Reaching that conclusion we need not consider other points raised by plaintiff in error as it becomes necessary to reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

135 - 20371

WALTER LAKOMSKI, for the use of WALTER BERANDYS,
Appellant,

vs.

JOSEPH LEONARD,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Walter Berandys recovered a judgment by confession against Walter Lakomski for $680.90, and on execution thereon was returned "no property found and no part satisfied." Afterwards appellee Leonard and one Janevsky, among others, were summoned as garnishees. On oral answer by Janevsky, a judgment for $391 was entered against him as garnishee, which, appellee states here has been paid, thus reducing the amount due on the judgment to $289.90. No answer was made by Leonard, but the court upon the evidence heard discharged him, and from the judgment order of dismissal this appeal is taken.

It appears that while Lakomski was indebted to Berandys on his promissory note on which said judgment was entered he made a bulk sale to Leonard through Janevsky as broker, of a stock of goods in his store for $1700, which was paid to Janevsky under some sort of an agreement whereby he was to pay the other creditors of Lakomski in full and then pay Berandys from what was left. At the time of the garnishment Janevsky had left in his hands only $391, for which judgment was taken against him as aforesaid.

While it was testified that Lakomski furnished Janevsky with a list of his creditors it appears that no

written statement under oath containing a complete list of the vendor's creditors, their addresses and amounts owing each, was either demanded or furnished prior to such sale, as required by Section 1 of the Bulk Sales Act. Nor did the vendee before taking possession of the goods or before payment of the purchase price cause to be delivered, as required by said Section 1, a notice in writing to each of the creditors of the proposed purchase. Under the terms of said act, therefore, the sale and transfer of the goods were fraudulent and void as against the creditors of the vendor. As against them the goods would be regarded, if still held by the purchaser Leonard, as the goods of the debtor, and, if sold, the proceeds therefrom would be regarded as the debtor's property. In either event Leonard was subject to garnishment. (Konski v. Smith, 234 Ill. App. 206, and cases there cited.)

The court's rulings were predicated on the theory that the placing of the purchase price of the goods in the hands of Janovsky for the benefit of the creditors relieved the vendor and vendee of the necessity of complying with the provisions of the Bulk Sales Act. Such a position is untenable. (Block v. Brackett, 214 Ill. App. 488.) The court seemed to think, too, that the act protects only merchandise creditors. The statute is not so limited. It has been held in this State that it applies to any goods or chattels sold in bulk, otherwise than in the ordinary course of trade in the regular and usual transaction of business. (See 27 C. J., Sec. 329, n. 17, and Illinois cases cited.)

In view of the evidence showing that Leonard purchased and acquired possession of the debtor's goods in violation of

provisions of the Bulk Sales Act, thus rendering the sale void, it was error for the court to discharge him. Accordingly the judgment of dismissal as to him will be reversed and the cause remanded for proper procedure under the Garnishment Act.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

29587

171 - 29587

430

DANIEL MADIGAN, Appellee, vs. GEORGE F. MIXER & CO., a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment on the finding of the court that plaintiff recover against defendant damages in the sum of $231.90.

The cause of action set forth in the statement of claim is "for loss of profits" resulting from a boiler explosion on December 23, 1923, caused by the negligence and carelessness of defendant, on premises which plaintiff leased from defendant and which were closed after the explosion, by reason of which plaintiff was unable to dispose of a stock of Christmas trees, mistletoe and wreaths which were left in the premises and became worthless after Christmas.

The evidence discloses that defendant was an agent of the owner of the building (whose name or residence does not appear) and through one of its agents made an oral lease of a store in the building to plaintiff for the period of two weeks from December 17, for $25, for which receipts were given in defendant's name by one of its agents; that an explosion of the hot water heater in the basement of the building took place December 23; that pursuant to an order of the fire department that a sign be put up to protect curiosity seekers defendant put up a sign on the building reading "Dangerous keep out;" that most of the stock remained in the building until after Christmas, when it became

worthless. Plaintiff also made proof tending to show the value of the entire stock, less some mistletoe he had sold after the explosion.

Evans, one of defendant's agents, testified that on the morning after the explosion he offered plaintiff another store near by and offered to help remove his stock thereto, but that plaintiff said nothing and went away and did not return for two or three days afterwards. As to his making such offer he was corroborated by one of defendant's salesmen. Plaintiff, however, denied that the offer was made to him.

As to proof of negligence plaintiff relies upon the doctrine of res ipsa loquitur. There being some evidence, though meager, tending to show that the boiler was under the control and management of defendant there is room for the application of the doctrine.

But while there was some evidence tending to show that a portion of the stock was destroyed by the explosion, the evidence was not sufficient to show that the loss of the rest of the stock or its value was the proximate result of the explosion in the absence of proof that it could not have been removed from the building and by the exercise of reasonable efforts have been disposed of. In mitigation of the loss plaintiff should have made such efforts. (Peck v. Chicago Railways Co., 270 Ill. 34). There was some evidence tending to show that the property could have been removed, and none to show that it could not. Plaintiff alleged in his statement of claim, but failed to prove, due diligence to mitigate the loss from such explosion. The fact, as he testified, that he made efforts to dispose of his stock to competitors and succeeded in selling wreaths and mistletoe tends to show that he was able to remove some of the stock; and that other stock could have been removed may also be inferred from the

fact that the collapse of the building from the explosion was in the rear and that the stock in the front of the store remained uninjured, and from the evidence, if believed, that defendant offered to remove the same for plaintiff. At any rate, there was no evidence that it could not be removed by reasonable efforts on the part of plaintiff.

Hence, even upon the assumption of defendant's liability, it cannot be said that the entire loss of the stock or its value resulted from the explosion.

Nor does it necessarily follow that plaintiff in the absence of an explosion could have disposed of all of his stock within the two days left for marketing it, after which it became worthless.

The evidence being insufficient to sustain a judgment for the entire stock in the absence of adequate proof to show that the entire loss was the proximate result of the explosion, and we being unable to determine therefrom how much stock was destroyed or the value thereof, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

175 - 29591

PARISIAN NOVELTY COMPANY, a corporation, Appellant, vs. MATHEW T. DUNN and FRANK DUNN, trading as Dunn Brothers, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit in a fourth class case brought by appellant against appellees for an alleged breach of warranty in respect to 1000 cigaret cases sold by the latter to the former.

In a former suit between the same parties in which appellees sued appellant for the purchase price of said cases appellant filed a set-off based upon the same grounds as this cause of action, to which appellees filed a general denial. Upon the issues thus formed there was a judgment for appellees (defendants in this case) which has become final by affirmance in this court.

The gist of appellant's statement of claim is that the cigaret cases bought of appellees were not reasonably fit for the purposes for which they were intended and did not correspond with the description specified in the contract of sale, and by reason of their shipment and return appellants incurred divers expenses, damages and loss of profits. Appellees did not question the contract but denied the alleged unfitness of the goods and their failure to correspond with the terms of the agreement, and pleaded said former judgment in bar.

Appellant contends that appellees failed to establish a case of former adjudication and argues that the verdict rendered in the former suit was based upon the common counts, and that the court refused to allow appellant in that case to amend its pleadings so as to present the issue involving the question of breach of warranty.

The record in that case discloses that the recovery sought under the common counts was for the price of the goods, and that appellant pleaded as a defense that appellees agreed to manufacture said cases in accordance with certain samples and utterly failed to manufacture and deliver to appellant cases in accordance with said samples and agreement, and also filed a set-off claiming damages for loss of its reasonable profits by reason of such breach of contract and failure. The set-off, to which there was a general denial, unquestionably raised the same issue presented here, bearing on which there was evidence offered by appellant, and the judgment against appellant was conclusive of that issue, which was presented regardless of the court's refusal of an amendment asked for by defendant after verdict. In the two suits there was identity of parties, of subject matter and of cause of action. Appellant's claim for damages under its set-off, which is in the nature of a cross action, was based upon the same grounds, though not so specifically stated, on which it seeks recovery in the present suit. We cannot agree, therefore, with the contention that there was not, and could not be, on such a state of the pleadings in the former case, an adjudication on the same issues as are presented in the case at bar. "It is well settled" says the Supreme Court in People v. Sunset Light Co., 306 Ill. 377, "by the decisions of the Supreme Court of the United States and of this court that, where a former adjudication is relied upon as an absolute bar,

there must be, as between the actions, identity of the parties, of subject matter and of cause of action * * * In order that the judgment in the first suit shall operate as an estoppel in the second suit, it must appear on the face of the record or must be shown by extrinsic evidence, that the precise question was raised and determined in the first suit."

Appellant quotes other expressions from the last cited case and also from Riverside Co. v. Townshend, 130 Ill. 9, to the effect that where a judgment in a former case is rendered upon the merits and a second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or point controverted therein, "and the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined." But it appears from the record that appellant introduced testimony in the former case tending to show a right of recovery upon its set-off so that it would appear that the question involved here in the independent suit was actually litigated and determined in the former suit.

We think the rule stated in 34 Corpus Juris, Par. 1266, is applicable:

> "All defenses to plaintiff's cause of action which were set up and adjudicated are concluded by a judgment for plaintiff so that they cannot thereafter be urged as against further proceedings upon the same cause of action or in further litigation between the same parties upon the same subject matter. Under this rule, matters alleged by way of defense to an action and fully negatived by the judgment therein, cannot afterwards be made the basis of a new action by the former defendant against the former plaintiff even though in its subsequent action, the complaint amplifies the former defense by stating the evidence to prove it."

Without quoting from them the following cases somewhat similar to this are illustrative of that rule: Blodgett & Grosell

Co. v. George S.Lings Co.,194 Fed. 569; Brevet Mfg. Co. v. Moore Bras. Glass Co., 168 Fed. 246; Berman v. Henry H. Clark, 194 Mass. 248; Gilmore v. Williams, 162 Mass. 251.

While it has been said that the doctrine of former adjudication extends not only to the questions actually decided, but to all grounds of recovery or defense which might have been presented, (People v. Harrison, 253 Ill. 635) we think the record of the former suit introduced in evidence in this case must be regarded as an adjudication of the merits of the set-off and, therefore, of the cause of action in the instant case. That being so, the fact so established cannot be again drawn in question between the same parties. We think the plea of res judicata was sustained.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

104 - 29513

SHATTUCK SCHOOL, INC., a corporation, etc., Appellant, vs. JAMES A. DAVIS, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

237 I.A. 633

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit to recover $500, claimed as a balance due for tuition and board for defendant's minor son for the school year, 1922-1923, the court, after a trial without a jury, found the issues in defendant's favor and entered judgment against plaintiff for costs, and this appeal followed.

It is alleged in plaintiff's amended declaration that on July 15, 1922, defendant made application for the reservation of a place at the school for his son, Sterling Davis, during the school year 1922-1923; that at the time of the making of the application plaintiff's annual charge for tuition and board of a pupil was $1,000, due and payable at the opening of the school in September, "but, if desired, the payment of one-half might be deferred until the following first day of January;" that the rules of the school provided that "in case of dismissal or withdrawal of a pupil during the school year no part of the annual bill for board and tuition paid would be refunded, and any amount unpaid remained due to plaintiff," that "the use of tobacco in any form is positively forbidden and infractions of this rule are severely punished," and that "a second offense leads to instant dismissal;" and that defendant had knowledge of the amount charged for tuition,

etc., of the terms and conditions upon which the same became due and payable, and of the existence of said rules. It is further alleged that defendant's application as accepted and that his son entered the school upon the terms and conditions and subject to the rules aforesaid, remaining there was a pupil until January 26, 1923, when he was dismissed for "a violation of said rule forbidding the use of tobacco;" that the son, previously and while a pupil, had violated said rule during the preceding school year; that on May 10, 1922, plaintiff notified defendant of such violation and that if repeated it would be impossible to keep the son in the school; and that defendant paid $500 on account of the tuition fee of $1000 for the school year beginning in September, 1922, but has not paid the remaining $500, although often requested so to do.

On the trial the deposition of C. W. Marshall, Headmaster of the school, and various letters and papers were introduced in plaintiff's behalf. Defendant was a witness in his own behalf, and other letters, etc., were introduced by him.

The following facts were disclosed: In March, 1920, defendant made application for the admission of his son, then 13 years of age, for the school year, 1920-1921, that began about the middle of September, 1920. The application was accepted and the son attended during that school year. He also attended under another application during the following school year, 1921-1922. Defendant paid the tuition, etc. for both years, and at all times had knowledge of the rules of the school regarding the amount of the tuition, etc. and the time or times of the payment thereof, and also of those forbidding the use of tobacco in any form by a pupil and the prescribed punishment for violations thereof, which rules were shown to be substantially as alleged in plaintiff's declaration. While in attendance

during his second year the son smoked tobacco, and, upon charge made, admitted it. Thereupon, on May 10, 1922, the Headmaster wrote defendant: "I feel I should write you that our rules in this matter are very strict, and that if the offense is repeated it will not be possible for us to keep the boy in the school. * * I hope you will write to Sterling, impressing upon him the seriousness of the situation, and the necessity of his avoiding any repetition of the offense during the school year." The son was not again charged with a violation of the rule during said school year. On July 15, 1922, defendant wrote the Headmaster: "Please reserve a place at Shattuck for my son * * for the school year 1922-1923," but on August 4, 1922, he wrote that he was doubtful as to the advisability of his son's return to the school, because of the "possibility of expulsion for what is not a moral offense, but enough, through expulsion, to stain his record." The Headmaster urged that he return and he did return at the beginning of the school year in September, 1922. Defendant showed by secondary evidence (plaintiff not producing the original letter after notice) that he wrote and personally mailed on September 30, 1922, the following letter to the Headmaster: "Referring to bill for Sterling's tuition would state that in accordance with previous letters, I am not willing to enter him for the full term and will send you a check in a few days to cover the first half of term. If I conclude, which I hope to be able to do, to have him remain thereafter, continuing the full term, I will then send you the remainder of the charge for the term." Plaintiff did not reply to this letter, but there was no proof introduced in its behalf that it did not receive the same. On October 4, 1922, defendant mailed to plaintiff his check for $600, tuition and board for the half year, $500, and on incidental expense account, $100. The check was endorsed by plaintiff and cashed.

On January 26, 1923, the son was reported for smoking, admitted it, and, as testified by the Headmaster, "this being the second offense, he was dismissed from the school." About February 15th, there being a balance to defendant's credit of $10.59, on the son's incidental expense account, plaintiff mailed to defendant a statement of the account and its check for the balance. In March and again in May, 1923, the Headmaster wrote to defendant, enclosing bills for $500 for balance due for tuition, etc., for the entire school year, and urging the reasonableness of the charge "even though Sterling was not here for the last half of the year." Defendant refused to pay the amount, and in October, 1923, plaintiff commenced the present action.

At the time of entering the finding and judgment the trial court delivered an oral opinion, saying in part: "It is quite clear to me that there must be two infractions in one year. * * Each one of the contracts is an independent contract. * * They should not have dismissed this boy this year for this one offense. They should have gotten another offense on him, and then they had a right to dismiss him. * * If the boy had been sent there for a course of years, four years, and had committed two infractions, clearly they had the right to dismiss him, but it seems to me they took him every year on an entirely new basis. That is the purpose of the new application, new registration and new payment every year."

Counsel for the respective parties appear to agree as to the following principles of law: (1) That a school like plaintiff's has power to adopt and enforce such rules and regulations as its governing body deems expedient for the government of the institution, including rules regarding the expulsion of a pupil for certain named causes, and that the courts may not interfere with their proper enforcement, if they do not violate

good morals or the law of the land or unless their enforcement is from malicious or improper motives. See People v. Shurtleff College, 42 Ill. 186; McClintock v. Lake Forest University, 222 Ill. App. 468, 474; Tester v. Horner Military School, 165 N. C. 564, 568; (2) That defendant's application for his son's admission to the school, together with the printed catalogue and the rules and regulations of the school therein mentioned of which defendant had notice, constituted the contract between the parties. See Hanson v. Culver Military Academy, 141 Ill. App. 250, 252. and (3) that the rule of plaintiff's school, viz, that in case of the proper dismissal of a pupil during the school year no part of the annual bill for board and tuition will be refunded and any amount unpaid thereon remains due and payable, is valid and enforceable. See Kentucky Military Institute v. Bramblet, 156 Ky. 205; International Textbook Co. v. Martin, 221 Mass. 1; Tester v. Horner Military School, 165 N. C. 564, 571. One of the controversies between the parties is whether defendant's son was properly dismissed because of his two violations of the rule of the school against the use of tobacco, which two violations were not committed during the same school year. Counsel for plaintiff contend that the court was in error in holding that, in order to warrant the dismissal, the son's two offenses must have been committed in the same school year, and in entering the finding and judgment in favor of defendant. Counsel for defendant, on the other hand, contend (1) that plaintiff first breached its contract with defendant when it summarily dismissed the son from the school in January, 1923 (because of two violations of the rule, one of which did not occur in that school year) thereby barring a recovery of the balance of the tuition, etc. for the entire year, and (2) that the correspondence discloses that defendant did not finally

contract with plaintiff for his son's attendance at the school for the entire school year, 1922-1923, but only for the first half of that year, and the son was dismissed before the second half had commenced. After a careful review of the evidence we are of the opinion that both contentions of defendant's counsel are well founded. We approve of the holdings of the trial court, to the effect that separate contracts were made for each school year and that, in order to warrant the dismissal of defendant's son for violations of the rule against the use of tobacco, the second violation must have occurred in the same school year as the first violation. Apparently, this was also plaintiff's construction of the rule before the present action was commenced. When, in the prior school year, the son's first violation of the rule occurred, the Headmaster, on May 10, 1922, wrote defendant "I hope you will write to Sterling, impressing upon him * * the necessity of his avoiding any repetition of the offence <u>during the school year</u>." As to defendant's counsel's second contention, while it is true that defendant in July, 1922, applied for a place at the school for his son for the entire year 1922-1923, still the subsequent correspondence between the parties sufficiently discloses, we think, that the son was entered only for the first half of the year, with plaintiff's acquiescence, and that before the half year had expired he was dismissed. That such was the understanding between the parties is strengthened by the fact that plaintiff, shortly after the son's dismissal, returned to defendant the balance of $10.59, which then stood to the latter's credit on the son's expense account. If plaintiff then considered that defendant owed any balance for tuition, etc., the usual procedure would have been to have sent a bill for the balance, crediting said $10.59 thereon.

And we do not think that there is any merit in plaintiff's counsel's further contention that, because of the limited defense as specified in defendant's affidavit of merits, the trial court was not warranted in considering the questions whether the two violations of the rule against the use of tobacco must be committed in the same school year and whether defendant's son had not been wrongfully dismissed. To plaintiff's amended declaration, as above outlined, defendant filed a plea of the general issue, and also an affidavit of merits stating that he had a good defense to plaintiff's demand in that "no such contract, as by plaintiff's declaration was averred, was entered into by and between the parties." We think that, in view of the allegations of the declaration, the affidavit sufficiently complied with the provisions of section 55 of the Practice Act and sufficiently apprised plaintiff of the defenses which were afterwards made on the trial and passed upon by the court.

For the reasons indicated the judgment of the Superior Court should be affirmed and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

143 - 29559

GEORGE COMERFORD and FRANK DUVALDT,
copartners as COMERFORD AND DUVALDT,
Appellees,

vs.

WILLIAM H. RALOUSEK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 633

MR. JUSTICE GRINNELL DELIVERED THE OPINION OF THE COURT.

In an action to recover commissions as licensed real estate brokers for procuring, as alleged, a purchaser for defendant's premises in Chicago, the court, after a trial without a jury, found the issues in plaintiffs' favor and entered judgment against defendant for $265, the amount claimed by plaintiffs. This appeal followed.

The issue made by the pleadings was whether or not plaintiffs were the procuring cause of the sale. The evidence disclosed the following facts in substance: The premises were sold on September 3, 1923 (Labor Day) to William J. Marguerat and wife (also called Marquardt). During August, 1923, defendant listed them for sale with several real estate brokers, including plaintiffs' firm and the Portage Park Realty Company. On Friday, August 31st, one of the plaintiffs, Comerford, showed the premises to Marguerat and his wife, but Marguerat was not then favorably impressed with them, and Comerford was informed that if they decided to purchase they might renew negotiations with him. Comerford postponed making further efforts to consummate the sale. Within the next two days a representative of the Realty Co. had such negotiations with Marguerat and wife as resulted in their signing a contract (afterwards consummated) on the morning of Labor Day to purchase the premises. On the day after Labor Day defendant called at plaintiffs' office and notified them that the

premises had been sold. They then claimed that they were entitled to the commissions and on the ground that they first had submitted the premises to the purchaser. Defendant refused to pay them any commissions and subsequently paid commissions to the Realty Co. On September 15th plaintiffs commenced the present action.

After a careful review of the evidence we are of the opinion that the trial court erred in its finding and judgment. It is clear that plaintiffs were not the procuring cause of the sale, and that it was owing to the efforts of the representative of the Realty Co. that the sale was consummated. In McGuire v. Carlson, 61 Ill. App. 295, 299, it is said: "Unless he specially agrees not to do so, an owner may employ two or more brokers; in such case it is the broker who is the efficient cause of the sale who is entitled to commissions; and this right is not affected by the fact that such broker sells to one whose attention to the property had before been called by another broker. It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second who engaged the attention of the purchaser." The facts of the present case are such that the decision in Rigdon v. More, 236 Ill. 382, cited by plaintiffs' counsel, is not applicable thereto. The judgment of the Municipal court should be reversed and it is so ordered.

REVERSED.

Fitch, P. J., and Barnes, J., concur.

143 - 29550. FINDING OF FACTS.

We find as an ultimate fact in this case that the plaintiffs were not the procuring cause of the sale of the premises in question by defendant to Marguerat and wife.

168 - 29584

JULIA V. JENKINS,
Appellee,

vs.

P. H. HOUY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On this appeal defendant's counsel urges that the trial court committed errors as follows: (1) Receiving plaintiff's counter affidavit on the merits on the hearing of defendant's motion, supported by his affidavits, to open up a judgment rendered against him by confession; (2) Denying defendant's motion for a change of venue; (3) Refusing to open up the judgment.

The judgment by confession was entered on a lease on January 24, 1924, for the sum of $1510.95. The lease, attached to plaintiff's declaration, is dated May 1, 1921, and by it plaintiff demised the premises to defendant for a term of three years at a monthly rental of $125, payable on the first day of each month during said term. Plaintiff charged in her declaration that by virtue of the demise defendant entered into and controlled the possession of the premises until and including January 1, 1924, on which date there was due to her from defendant as rent since May, 1923, after allowing certain enumerated credits, the sum of $1485.95. The judgment confessed includes this sum and $25 for attorneys' fees. On February 21, 1924, defendant, after notice, appeared and moved the court to vacate the judgment, supporting the motion by his own affidavit, in which he alleged that the first

information had of the entry of the judgment was when an execution issued thereon was served upon him by the sheriff on February 18th, and that he has a good defense to the whole of plaintiff's demand, in that on November 1, 1922, by mutual agreement between affiant and plaintiff, "there was a parol surrender of the said lease by this affiant and acceptance thereof by plaintiff," whereby he "was released from any obligations under said lease, and since that time he has not been in the possession of said premises or any part thereof."

The bill of exceptions discloses that the first hearing on the motion was had on February 23, 1924, at which time defendant's said affidavit was read to the court; that thereupon plaintiff's attorney presented plaintiff's counter-affidavit, which, over defendant's objection, was received and read to the court; and that thereupon the further hearing of the motion was continued to March 1, 1924. In plaintiff's affidavit she denied that she ever entered into a parol agreement with defendant for a surrender of the lease, whereby the latter was released from his obligations thereunder. The affidavit related wholly to the merits of the controversy and it is well settled that such a counter-affidavit on a motion to set aside a default judgment or to open up a judgment by confession should not be received or considered by the court. (Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill. 510, 513; Mead v. Osborn, 170 Ill. App. 230, 232; Mutual Life of Illinois v. Little, 237 Ill. App. 436, 439.)

On February 27th defendant appeared and moved the court to grant a change of venue on the ground that he feared that he could not receive a fair trial because the trial judge was prejudiced against him, and that knowledge of such prejudice did not come to him until after February 23, 1924. The motion

was supported by defendant's petition and affidavit in full compliance with the provisions of the Venue Act. It, however, was continued by the court until March 1st (the same day the prior motion had been continued to) and on March 1st, there was a further continuance of both motions to March 8th. On the last named day there was first a hearing on the motion for a change of venue, which was denied over defendant's objection. We think that in this action the court erred. Where all the requirements of the statute have been observed by an applicant for a change of venue, as here, the court has no discretion in the matter but should grant the change. (Walsh v. Ray, 38 Ill. 30, 33; Knickerbocker Ins. Co. v. Tolman, 80 Ill. 106, 107; Donahue v. Exon, 85 Ill. App. 20, 21; Simpson v. Simpson, 165 Ill. App. 515, 516.)

After the motion for a change of venue had been denied defendant presented an additional affidavit, sworn to by him, in which the defense of a parol surrender of the lease was set forth with more particularity than in his first affidavit. The court finally refused to open up the judgment entered by confession and ordered that the same stand in full force and effect for the sum of $1510.95, as of the date of its rendition on January 24, 1924. We are of the opinion that the affidavits were sufficient to entitle defendant to have a hearing on the merits of the defense as alleged, and that the court erred in not opening up the judgment. It is well settled that there may be a verbal surrender of a written lease; (Baker v. Pratt, 15 Ill. 568, 571; Williams v. Vanderbilt, 146 Ill. 238, 246); which need not be proven by express and direct evidence but may be inferred from the acts and conduct of the parties (Reeter v. Hartford Deposit Co., 190 Ill. 380, 385; Thompson v. Eastern Casket Co., 219 Ill. App. 184, 190.)

For the reasons indicated the order of the circuit court of March 8, 1924, wherein said judgment by confession was confirmed as of the date of its entry, is reversed and the cause is remanded with directions to grant the motion for a change of venue and to open up the judgment and to allow defendant to make a defense thereto and have a trial upon the merits, the judgment in the meantime standing as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch, P. J., and Barnes, J., concur.

29595

179 - 29595

FRANK FLESZAR,
Appellant,

vs.

ANNA FLESZAR,
Appellee.

APPEAL FROM
SUPERIOR COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior court of Cook County, entered May 28, 1924, sustaining defendant's general and special demurrer to complainant's bill to review (based on matters apparent upon the face of the record) a decree of divorce rendered in defendant's favor by the same court at its January term, 1922, and dismissing the bill for want of equity.

We are of the opinion that the court's action was correct. The bill in question was filed on March 31, 1924, more than two years after the entry of the divorce decree. By section 117 of the Practice Act, as amended in 1919, (Cahill's Stat. 1923, p. 2863) it is provided: "A writ of error shall not be brought after the expiration of two years from the rendition of the decree or judgment complained of; but when a person thinking himself aggrieved by any decree or judgment that may be reversed in the Supreme Court or Appellate Court, shall be an infant, non compos mentis or under duress when the same was entered, the time of such disability shall be excluded from the computation of the said two years." And it is well settled that a bill of review for matter apparent upon the face of the decree or record can be brought only within the time allowed for the suing out of a writ of error (Allison v. Drake, 145 Ill. 500,

311; Dalton v. Erb, 83 Ill. 289, 290), unless some very clear reason is shown for the delay (Sloan v. Sloan, 192 Ill. 581, 583; Stevenson v. Stevenson, 224 Ill. 482, 484) or unless the complainant is under disability. (Gang v. Gang, 254 Ill. 161, 164.) The allegations of the bill do not disclose any sufficient reason for the delay, or that complainant had been under any disability or duress. And complainant's laches appearing on the face of the bill, and no sufficient grounds being alleged in explanation thereof, the question could properly be raised on demurrer. (Stevenson v. Stevenson, supra; Gayrell v. Elkins, 157 Ill. 462, 471.)

But outside of complainant's laches, we do not think that the bill shows any ground for equitable relief as prayed. It sets forth the filing on November 1, 1921 of defendant's bill for divorce on the ground of his desertion without reasonable cause in January, 1918, the subsequent filing of complainant's answer thereto, admitting the marriage but denying in general terms the desertion, and a stipulation of the parties by their respective solicitors that the divorce suit be tried on bill and answer "as a default case." It also sets forth the certificate of the evidence heard on the divorce trial on December 30, 1921, and the divorce decree. From said certificate of evidence it appears that complainant's solicitor was present; that defendant and two other witnesses testified as to complainant's desertion; that complainant's solicitor then stated that complainant had no defense and, in response to the court's inquiry as to alimony, that "the property rights have been adjusted;" that thereupon, in response to the court's further inquiry, the defendant stated that she and her husband had "settled their property interests out of court," that she understood she could not come in later and make any further claim for alimony, and that she was

"satisfied" with the adjustment. The decree of divorce is in the usual form, but contains the additional finding that the parties "are the owners as tenants in common" of certain real property in Cook County (describing it) and, in addition to decreeing the divorce, further decrees that "defendant (complainant herein) convey and quit claim to the complainant (defendant herein) his undivided half interest in said real property, provided that concurrently therewith the complainant pay to the defendant $2800, which sum the court finds is paid concurrently with the entry hereof, and the deed above directed to be executed is concurrently herewith delivered and the title to said real property vested in the said complainant as her sole and separate estate. This to be in full settlement and discharge of all claims and demands present and future of the said complainant against the defendant for alimony or other marital right." The present bill does not seek to have the entire decree set aside on review, but only that portion concerning said real property. It is alleged that complainant "considers himself aggrieved by being compelled to convey his property interests" to the present defendant, and for the reasons in substance (1) that the divorce court had no jurisdiction of complainant's property rights because neither they nor any alimony to be paid defendant was made an issue in the pleadings in the divorce proceeding; (2) that said sum of $2800 which he received "is wholly inadequate to represent his interest in said property, the value of which was and is about $22,000, with an incumbrance of about $7,000;" (3) that he was "fraudulently misled" as to the stipulation for a default hearing by the statements that alimony was waived; and (4) that he was otherwise "misled" by his solicitor into signing said quit claim deed. But the bill in its entirety clearly shows that complainant was not compelled to convey the property mentioned, that he voluntarily did so in

consideration of receiving $2800 from defendant and that the transaction had been fully consummated when the divorce decree was entered; also that the portion of the decree as to said property was entered by consent, and such a decree "cannot be reversed, set aside or impeached by a bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not in fact given, or something was inserted as by consent that was not consented to." (Knoblesh v. Mueller, 123 Ill. 554, 555.) No facts showing fraud, or that the decree was entered without his knowledge or consent, are stated.

The decree of the Superior court dismissing the bill for want of equity is affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

216 - 29633

4356a

A. I. GIDWITZ,
Appellee,

vs.

CELIA LEVINE and BERNHARD
E. LEVINE,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

237 I.A. 634

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree affirming a master's report in a foreclosure proceeding wherein it was found that on October 31, 1920, defendants being indebted for $4,000 executed their principal note due sixty days after date with interest, secured by their deed of trust conveying certain real estate described therein, which was duly recorded; that there was good and sufficient consideration for the execution of the note; that default has been made in the payment of interest and principal maturing December 1, 1920; that complainant, A. I. Gidwitz, is the legal holder and owner of said principal note; that each and every material allegation of the bill of complaint has been proven. The master recommended that a decree be entered in accordance with the prayer of the bill. The objections and exceptions to this report were overruled by the chancellor and a decree entered as recommended.

The loan, represented by the note and trust deed, was negotiated by complainant's brother, Jacob Gidwitz, who was vice-president and cashier of the Community State Bank. This bank had no interest in the loan. The money loaned was paid to Mr. LeVine, husband of Celia, the co-defendant, by the personal check of Jacob Gidwitz, and deposited by LeVine to his account

in the Community State Bank, which account was in the name of the Northwestern Fur Company, under which he was doing business. On the same date checks were drawn by him against this account, payable to certain of his creditors, which were certified to and paid by the bank.

Defendants' answer alleged that the note and trust deed were delivered by Celia LeVine to the Community State Bank upon the condition that the bank would certify certain checks drawn by Bernhard LeVine, but that it refused to do so, therefore the note and trust deed were obtained by fraud and without any consideration. Upon the hearing there was no evidence that the loan was made by the bank or any agreements or promises made by its officers in connection with the transaction.

Upon the hearing defendants seemed to concede that the loan was not made by the bank but was made by Jacob Gidwitz. Defendants testified that Bernhard LeVine had given two checks to the order of Friedman and Post, which had been returned marked "not sufficient funds," and that Post was threatening to have LeVine arrested. The title to the real estate in question was in Mrs. LeVine, and in order to avert this threatened arrest the note and trust deed were executed by defendants and were delivered by Mrs. LeVine to Jacob Gidwitz upon the condition that the Friedman and Post checks would be paid; that subsequently, upon learning that these checks had not been paid, the defendants at once demanded the return of the note and trust deed and Gidwitz repeatedly promised to return them. There was evidence tending to support defendants' version of the transaction.

Complainant's version, opposing that of defendants', is that Gidwitz had no dealings with Mrs. LeVine; that when the loan was made two checks were drawn by Gidwitz on the Community State Bank aggregating $4,035, payable to the order of B.M.LeVine,

which were deposited by him to his account, under the name of Northwestern Fur Company, and on the same date three checks were drawn by LeVine against his account to three of his creditors for amounts aggregating $4,035, just the amount Gidwitz gave him.

Jacob Gidwitz, on the strength of the note and trust deed, gave LeVine the full amount represented by the note. The only serious dispute between the parties is whether Gidwitz received the note upon condition that the money loaned should be used by LeVine to pay Friedman and Post rather than certain other creditors. No convincing reason appears why Gidwitz should not have been as willing to have Friedman and Post paid as other creditors. It was immaterial to him which creditors of LeVine should be paid; so the presumption is against defendants' version and favors that of the complainant.

This same presumption obtains with reference to the alleged promise of complainant to return the note and mortgage to the defendants. Having loaned the full amount of the note, it is hardly believable that he would promise to return it, thus parting with his best security for the repayment of the money advanced by him. We can hardly imagine a business man, having actually loaned the amount of a note, promising to return it upon learning that the borrower did not use the money in precisely the expected way. While complainant's denial of any promise to return is met by the contrary testimony of several witnesses, their testimony does not convince us in face of its inherent improbability.

It is strongly urged that Jacob Gidwitz was a partner with LeVine in the Northwestern Fur Company, and that this was the motive for diverting the borrowed money from Friedman and Post to the creditors of the Fur Company, and that as he was bound as a copartner of this company for the payment of its debts, the discharge of his legal obligation in this way would not be a consideration

for the note. The master could properly find that Jacob Gidwitz was not a copartner with Mr. LeVine in the Northwestern Fur Company. LeVine's testimony on this point is hardly believable. At one time he asserts that the Community State Bank was in business with him. Examining his testimony closely indicates that he means that either the bank or Gidwitz at times loaned him money to buy merchandise. On the other hand there was ample testimony that Goldwitz was not a partner. LeVine was the only one authorized to sign checks of the Northwestern Fur Company. There is no writing of any copartnership. LeVine at one time told representatives of R. G. Dunn & Co. that he had no partners and never had had; there is more evidence of this kind.

It is pertinently suggested that Friedman and Post also were creditors of the Northwestern Fur Company, in which case Gidwitz, if a partner, would be as much obligated to them as was LeVine and there would be no occasion for the execution of the note and mortgage to take care of them.

When the note matured LeVine attempted to have it extended for a year and complainant agreed to extend it for only two months, which was not satisfactory to LeVine. There is evidence that this angered him and he threatened to try in every way to prevent complainant from recovering the amount of the loan.

There is considerable conflict in the testimony and the variant stories of the witnesses cannot be reconciled. The factor of credibility would largely influence a conclusion as to which of the parties was telling the truthful story. In determining this, the master in chancery, who saw the witnesses and heard them testify, had an important advantage over this court. Upon the entire record we are not persuaded that the decree was not justified, and it is therefore affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

338 - 28775

435 Ia

WILLIAM KOTZAIN,
Appellee,

vs.

PETER ORPHAN and DENNIS J. MOAN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 634

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Apparently this is a case where plaintiff claims right to possession of certain property by virtue of a chattel mortgage and foreclosure proceedings thereunder. The statement of claim alleges that defendant, Orphan, attached these chattels July 29, 1924, although plaintiff had taken possession of them July 25. Upon trial the court found right to the property was in plaintiff, and from the judgment on the finding defendants appeal.

The brief on behalf of defendants gives us very little, if any, help in considering the errors suggested. It is said that defendants took the property under an attachment writ and that plaintiff here should have intervened in the attachment case and therefore the court in the instant case had no jurisdiction. This is merely stated without any precedent or argument to support it. The Attachment act, chapter 11, section 29, provides that any person other than the defendant claiming the property attached may interplead, but this is not mandatory and we know of no reason and none is suggested why plaintiff was not entitled to proceed with the foreclosure of his chattel mortgage.

It is next baldly stated that the property set up in the statement of claim was not the same as in the mortgage. This claim is not so presented, either in the brief or abstract, as to be readily determined. However, the items of property appear to be

the same although in certain instances not described in the same language in the two documents, as, for instance, the chattel mortgage says, "One dishwasher sink", in the statement of claim this is described as "One galvanized sink." There are other like instances.

It is also stated that there is not enough evidence in the record to show that there was a valid foreclosure. We can not determine this without examining the record, which we will not search to discover grounds for reversal. Nothing is presented in support of the claim that the chattel mortgage is a fraud.

As stated above, defendants' brief presents nothing from which we can properly conclude that the judgment was erroneous. It is therefore affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

383 - 29800

THORDARSON ELECTRIC MANUFACTURING COMPANY, a Corporation,
Appellant,

vs.

CLARA McCABE, otherwise known as Clara Andrade, and C. L. ANDRADE,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 634

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment of nil capiat entered upon the verdict of a jury finding the defendants not guilty in an action to recover damages to plaintiff from the alleged wrongful acts of the defendants.

By its statement of claim plaintiff alleged that Clara McCabe was its credit manager with authority to sell its merchandise at certain fixed or list prices; that plaintiff did not know that she was in fact the wife of C. L. Andrade, a clerk in a cigar store and irresponsible financially; that she delivered over $800 worth of plaintiff's transformers to her husband, and charged him therefor only $568, or at the rate of $2 a transformer; that this pretended sale and delivery was pursuant to a conspiracy to defraud plaintiff. The affidavit of merits admits that defendants are married and the sales and deliveries at the amounts charged; but any wrong doing is denied, and Clara Andrade denies that she was required to adhere strictly to the list prices in selling transformers, and C. L. Andrade alleges willingness to pay the balance due on the transformers at the price at which he purchased.

Plaintiff's testimony tended to show that Clara Andrade, under the name of Clara McCabe, had charge of its credit department and made sales; that she sold a number of transformers at certain times to C. L. Andrade at less than the list price, one

typical sale testified to was of 100 amplifyers at $2 each, whereas plaintiff asserts that she was authorized to sell these for $2.80; that the entire number of amplifyers or transformers sold at the list price aggregating $810.60, whereas C. L. Andrade was charged only $568, of which $44 has been paid.

Clara Andrade testified that she had been working for plaintiff for five years; that she was married to C. L. Andrade about six months before she sold amplifyers to him. According to her testimony she had authority to fix the price and there was no list price to which she was bound; that she was familiar with C. L. Andrade's financial condition when she sold him amplifyers; that when she made a sale she passed the order on th the order clerk who entered it, from there it went to the shipping clerk, thence to the bill clerk and then to the bookkeeper. She testified that she determined what the price would be except if it was a "big deal" they would consult with Mr. Thordarson, president of the plaintiff company. She used her own judgment and made many sales to various parties at other than the schedule prices. She offered to collect the balance due on the sales to Andrade, but Mr. Thordarson refused, saying that he would not accept payment at the prices made by her.

C. L. Andrade testified that he bought these transformers on time, as he bought other merchandise, and sold them; that at one time he asked Thordarson if there was anything wrong with these purchases and was told that it was none of his business. Andrade offered to pay the balance due at the price at which he had bought but Thordarson refused to accept any money unless the amount as claimed by him was paid in full.

The jury which saw the witnesses could better determine their credibility than can we. There is nothing inherently improbable in defendants' version and the circumstances seem to support it. The jury could properly find with defendants on the facts.

Plaintiff elected to proceed in tort. It is obvious that the proof failed wholly to show any wrong doing by the defendants as charged.

The verdict is the only one that could properly be returned, and the judgment thereon is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

401 - 29318

4359a

CHARLES A. GRIFFIN,
Appellee,

vs.

ALFRED HOMES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 635

MR. PRESIDING JUSTICE McDUNLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for real estate broker's commissions, upon trial by the court had judgment for $345.00.

There is no serious dispute as to the main facts. Plaintiff, a licensed real estate broker, talked with defendant concerning the sale of his property, saying that plaintiff had a purchaser who might be interested in it. Defendant then gave his selling price and terms and told plaintiff to bring the prospective purchaser to see the property. Plaintiff did so, and introduced George Robinson to defendant; after some talk Robinson and defendant agreed on a sale for $11,500, cash payment $2,000, the balance in installments. Plaintiff testified that defendant then agreed to pay plaintiff the usual rate of commission for making the sale. Robinson deposited with plaintiff $200 earnest money to bind the contract to be drawn. Defendant says that a condition of the sale was that plaintiff should secure a six-flat building which defendant could buy by trading in the contract with Robinson, but plaintiff says this was a separate transaction. A few days later Robinson called upon plaintiff, saying that defendant would not sign the contract, and demanded the return of his earnest money, and this was returned. About ten days thereafter defendant sold the property to Robinson for $11,500, cash payment $2,000, - the same terms upon which they had first agreed.

Defendant admits that he probably would not have sold the property to Robinson if plaintiff had not brought them together.

From these circumstances the court could properly find that plaintiff was the procuring cause of the sale and entitled to his commissions.

While the stenographic report does not show any formal proof that the usual commission is three per cent on the sale price of real estate, plaintiff alleged this in his statement of claim and it was not denied by defendant's affidavit of merits. There was no controversy as to the amount of the commission but only as to whether or not plaintiff was entitled to any commission for his services.

The judgment is right and is affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

29845

428 - 29845

4360

MATTIE LOCKHART, Administratrix of the Estate of J. W. LOCKHART, Deceased,
Appellee,

vs.

A. SILVER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 635

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a case of the fourth class in the Municipal court, in which plaintiff, as administratrix of the estate of J.W. Lockhart, deceased, brought suit for the balance due for some junked machinery sold by Mr. Lockhart in his lifetime to defendant for $250, on which $40 was paid on account. The only defense asserted was payment of the balance due to Mr. Lockhart in his lifetime. The case was tried by the court, who found the issues against defendant and entered judgment for $210.

It is said that as plaintiff sued as administratrix, it was incumbent upon her to prove that she had been duly appointed. Defendant did not deny plaintiff's capacity to sue as administratrix, therefore the representative character of the plaintiff was admitted. Damiani v. Proulx, 195 Ill. App. 184.

Most of defendant's brief is devoted to alleged incompetent evidence. The case was tried in a somewhat irregular way, and incompetent evidence was admitted on behalf of defendant as well as plaintiff. As the case was tried by the court, we will assume that its conclusion was reached only on the competent evidence.

The stories told by the witnesses for the defendant with reference to the alleged payment are inconsistent and contradic-

tory. Although the greater number of witnesses testified on behalf of defendant, yet the trial court could properly accept the version of the plaintiff and especially the testimony of Mr. Thomas O'Cook, a disinterested witness. He testified that in September, 1918, one year after the defendant claimed to have paid the balance due, he went with Mr. Lockhart to the residence of the defendant and Mr. Lockhart had a conversation with defendant and requested payment of the balance due; that defendant wanted Mr. Lockhart to throw off $40 of the balance, which Mr. Lockhart refused to do, saying that he would try to collect this balance in some other way. Accepting this as the most believable story, it negatives defendant's claim of payment and the finding for plaintiff properly followed.

The judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

29857

440 - 29857

436a

FREDA WINSON,
Appellant,

vs.

DENNIS J. EGAN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 635

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal the plaintiff challenges an order of the Circuit court denying her motion to vacate an order quashing a writ of replevin, issued at her instance, and ordering the return of the replevied property. The occurrences prior to this judgment were in this order:

In the Municipal court of Chicago in cause entitled Mitchell v. Winson, judgment was against the defendant for $1,750. The date of this does not appear.

October 27, 1933, Dennis J. Egan, chief bailiff of the Municipal court, seized the property in question (household furniture) and advertised the goods for sale for November 9, 1933.

On this date, November 9, Freda Winson commenced a replevin suit in the Superior court for the recovery of this property, which cause was entitled Freda Winson v. Charles Mitchell and Dennis Egan, as bailiff of the Municipal court.

December 31, 1933, on motion of defendants' attorney it was ordered that this replevin suit be dismissed for want of a declaration filed in said cause and that a writ of retorno habendo issue. Such writ was issued and thereafter the sheriff of Cook County, pursuant to the mandate of the writ, delivered the property into the possession of Egan, as bailiff.

The property was again advertised for sale for

January 25, 1924, and on that date Kazimar Jamontas purchased the property and the possession of it was delivered to him, together with a certificate of sale.

January 25, 1924, the date of the aforesaid sale to Jamontas, Freda Wincon commenced the present replevin suit, and under the writ issued upon her affidavit the property was seized and delivered to her.

January 30, 1924, Jamontas filed his petition alleging that he was entitled to the property by virtue of the aforesaid sale, also that from October 27, 1923, the date it was seized, under the execution in Mitchell v. Wincon, until January 25, 1924, the date of the sale to the petitioner, Jamontas, the property was located in the building where Freda Wincon resides with her husband, the defendant in Mitchell v. Wincon; that Freda Wincon was present when the property was sold to the petitioner, but at no time claimed or asserted any right or interest in said property, but on the contrary bargained with the petitioner to sell her the property after the sale to the petitioner. The petitioner also asserted that no proper bond had been filed with the sheriff of Cook county when the property was taken from him in the present replevin suit.

February 1, 1924, upon leave of court, Jamontas filed a petition and motion to quash the writ of replevin on the ground that no proper bond had been filed, in that the sureties on the bond had made false statements as to the property scheduled by them and thereby had committed a fraud upon the petitioner and the court.

February 2, 1924, Judge Rush of the Circuit court, on motion of Jamontas, the petitioner, ordered the replevin writ quashed and the cause dismissed at plaintiff's cost, and that the property replevied be returned to Jamontas.

March 29, 1924, an order was entered by Judge Marshall of the Circuit court over-ruling plaintiff's motion to vacate the order entered on February 2. The instant appeal is from this last order.

Jamontes could properly intervene and claim title to the property. He should have been made a party to the present replevin suit, as he had title to the property by virtue of the sale. The fact that plaintiff did not make him a party cannot deprive him of his right to assert his claim. Any person may intervene whose interest in the property will in any way be affected by the decision in the replevin suit. 34 Cyc, 1426. In the absence of a proper bill of exceptions we must assume that the court acted upon sufficient evidence in ordering the replevin writ quashed. Hanson v. Egan, 228 Ill. App. 329.

Where the plaintiff in a replevin suit permits his case to be dismissed for want of prosecution for failure to file a declaration, such plaintiff loses his right to prosecute the cause.

> "A plaintiff in replevin, by suffering his suit to be dismissed with an order for the return of the property, loses all right to contest the claim of the defendant in replevin to the property, except that given him by the statute, which is to plead and prove his title to the property in mitigation of damages. Stevinson v. Barnesi, 85 Ill. 513."

Bierma v. Columbia Typewriter Mfg. Co., 179 Ill. App. 66.

This appeal is from the order of March 29, 1924, by Judge Marshall, over-ruling the motion of plaintiff to vacate the order entered February 2, 1924, by Judge Rush. We do not know what matters were presented to Judge Marshall, the order merely reciting that the motion is denied "after arguments of counsel and due deliberation by the court." Hence nothing is presented to us from which we can determine the propriety of Judge Marshall's order. It goes without saying that he had no jurisdiction to sit as a court of review upon the proceedings before Judge Rush.

A further irregularity is that apparently a bill of exceptions was signed by Judge Swanson of the Circuit court, without any attempt to show the inability of either Judges Rush or Marshall to sign a proper bill of exceptions.

The records both in this case and the following case, number 29838, are not before us and we are informed by the briefs that they have been lost while in the possession of counsel for the plaintiff in both cases. Respective counsel do not agree as to certain important matters contained in the records. Ordinarily under these circumstances we would dismiss the appeals, but both counsel indicate a desire that we pass upon these appeals as best we may, upon the abstracts and briefs, and this we have attempted to do.

Upon what is before us there can be no other judgment of this court except affirmance.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

29558

441 - 29858

436 2a

HAZIMIR JAKOSTAS,
Appellee,

vs.

FREDA WINCON and JAMES WINCON,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 635

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By confession on two judgment notes made by the defendants, judgment was entered against them for $1430. Subsequently, on motion, this judgment was vacated and leave granted to defendants to make defense, the judgment to stand as security. The case was tried by the court and the judgment by confession was confirmed. From this, defendants have appealed.

The defense presented was no consideration for the giving of the notes. This is a companion case or sequel to case 29857, Wincon v. Egan et al., in which an opinion has this day been filed. We are asked to consider both cases together. The record in this case also has been lost while in possession of plaintiff's counsel.

Plaintiff's evidence tended to show that on February 2, 1924, he called at the hotel occupied by defendants to seize the furniture under the writ of replevin referred to in case 29857. Negotiations took place between plaintiff and defendants to effect a settlement of all matters. It was proposed that plaintiff sell the furniture to defendants and this was agreed upon. Defendants executed and delivered to plaintiff two notes, one for $900, the other for $400, and gave him $100 in cash, which was accepted as the purchase price for the furniture, which was then left in possession of the defendants.

Defendants do not dispute this, but attempt to assert the claim made by Freda Wincom that the furniture was here by reason of the facts which we have set forth in the opinion in case number 29357. We held in that case that as her replevin suit was dismissed, she ceased to have any right to the furniture. From the petition filed by Jamontas in that case it appears that Mrs. Wincom proposed to buy the furniture from him, and the evidence in the present case would indicate that the purchase was pursuant to that proposal.

However this may be, there is no competent evidence tending to impeach the sale. The furniture was a valid consideration for the giving of the notes.

There is much argument concerning the alleged misconduct of a certain attorney in these transactions, but any misconduct on his part cannot affect the disposition of these suits at law.

The judgment of the trial court was proper and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

439 - 29876

T. FRED LAKAMIE,
Appellee,

vs.

YELLOW CAB COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

4363

237 I.A. 636

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

One of defendant's taxicabs striking the automobile of plaintiff, suit was brought for damages and upon trial by the court plaintiff was awarded $150.

The liability of defendant is not questioned but it is claimed that the amount awarded is excessive. The plaintiff testified in detail as to the damages to his automobile resulting from the collision. His statement as to these details occupies a full page of the abstract. He also testified that some things had been repaired, others could not be repaired; that before the accident the reasonable market price of his automobile was $1,000, but that afterwards, because of the damages, the value was $750.

Plaintiff's testimony as to repairs is objected to on the ground that the statement of claim does not allege that plaintiff was forced to repair his automobile. This is a case of the fourth class in which it is not necessary for the statement of claim to particularize all the elements of damage.

It is said plaintiff was not qualified to testify as to costs of repairs and value of the machine. While it is true that plaintiff is an attorney at law, he also testified of his connection officially with a number of automobile organizations covering a period of years. He seems to have been properly qualified.

Defendant's counsel complains of the "verdict." The case was tried by the court without a jury and there was no verdict.

Even eliminating all the items of repairs, the judgment of $150 is considerably less than the amount plaintiff's automobile has been damaged. The judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

501 - 29918

4364a

WALTER W. AHLSCHLAGER,
Appellee,

vs.

I. IRVING JORDAN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 636

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for the balance due for his fees as an architect, upon trial had a verdict for $2821.18. From the judgment thereon defendant appeals.

Plaintiff alleged that he was a licensed architect and on March 12, 1921, was requested by defendant to prepare plans and specifications for a building to be erected in Chicago, and defendant promised to pay plaintiff therefor $8,500; that plaintiff prepared such plans and specifications and delivered them to the defendant, who paid plaintiff $6,000 on account, leaving a balance due of $2,500. Defendant by his affidavit of merits asserted that he did not agree to pay $8,500 as alleged by plaintiff, but agreed and promised to pay $6,000, which sum had been paid.

Having due consideration to the variant stories of the parties, the jury could properly find that when plaintiff completed and delivered the plans and specifications in May, 1921, he received $5,000 on account. July 19th a second architect's certificate was sent to defendant, including a statement of account reciting that the contract price for the architect's services was $8,600, on which $5,000 had been paid, leaving a balance due plaintiff of $3,600. No objection was made to this statement, and in September, nearly two months after its receipt by defendant, he paid $1,000 to plaintiff. About September 19th he telephoned to defendant requesting payment of the balance of his fee, amounting

to $2,500. Defendant stated he was pressed for cash and asked plaintiff to accept one-half of the $2,500 in cash and the other half in a note maturing in three months. Plaintiff replied this was satisfactory and asked that the check and note be mailed. Subsequently, on October 6th, plaintiff wrote defendant enclosing his bill for balance for services, amounting to $2,500, and calling defendant's attention to his promise over the telephone to pay one-half of this in cash and the balance in the three-months note. Plaintiff testified that he telephoned several times to defendant requesting payment. October 12th plaintiff again wrote, demanding payment of the balance of $2,500. No reply was made by defendant. The conversation in which he promised to pay one-half in cash and the other by note is not denied.

Two special verdicts were submitted to the jury. No. 1 was:

> "Did the transactions between the plaintiff and defendant after July 19, 1921, amount to an account stated due from the defendant to the plaintiff for the sum of $2,500?"

No. 2 was:

> "Did the defendant, after July 19, 1921, and after the payment by him to the plaintiff of the sum of $6,000, which is admitted in this case, further agree to pay the plaintiff the additional sum of $2,500, one-half in cash and the other half by note?"

Defendant does not assign as error that these special verdicts are contrary to the weight of the evidence, which must be done; otherwise they stand unchallenged in this court. F.E.C.A. St. L. Ry. Co. v. Bayard, 121 Ill. App. 49; Auchler v. Stafford, 185 Ill. App. 199; Veight v. Anglo-American Provision Co., 104 Ill. App. 423; 202 Ill. 462. Defendant asserts that this point is preserved by the seventeenth assignment of error. This assignment alleges that the special verdicts are "erroneous, indefinite and incomplete." This is not an allegation that they are contrary to the weight of the evidence.

Complaint is made of instructions, which are not set out in the brief where we may readily consider the objections to them. General Platers Supply Co. v. L'Hommedieu & Sons, 228 Ill. App.201. However, we have examined the instructions referred to and find no prejudicial errors therein.

Defendant seems to object specially to the allowance of interest on the balance due plaintiff. We do not understand that it is necessary to claim interest in the declaration. In any event, there was no objection on this ground to the testimony of an accountant who computed interest. The only objection by defendant was upon the basis that the jury was able to compute the interest, so that the testimony of the accountant was unnecessary. This being the only objection made, all others were thereby waived. Ewen v. Wilber, 208 Ill. 492.

At defendant's request the jury were instructed that plaintiff should not be allowed interest unless the jury believed from a preponderance of the evidence that the defendant had withheld the money by unreasonable and vexatious delay. Having requested the court to instruct the jury upon this point, the defendant cannot now complain that the facts proved were not within the allegations of the pleadings. I. C. R. R. Co. v. Latimer, 128 Ill., 163; Dunk Bros. Coal Co. v. Stroetter, 209 Ill. 134.

There was sufficient evidence to justify the jury in concluding that the delay was unreasonable and vexatious. In September, 1921, defendant promised to pay by cash or note. Although repeatedly requested to fulfil this promise, defendant failed to do so. The only defense stated in the affidavit of merits was that plaintiff had agreed to do the work for $6,000, and yet, under cross-examination, defendant admitted that he had no such agreement; and in July, 1921, in a sworn statement furnished to the parties who loaned the money for the building,

defendant stated that there was due plaintiff $7,500. In view of the complete failure of the defense presented by the pleadings, the jury was justified in finding that the delay was unreasonable and vexatious.

It is said that the trial Judge made a prejudicial remark before the jury. Taken in connection with the subject of the comment, we do not think that the words would be understood as a statement of a fact but merely as a conditional statement. However, the record does not show that there was any objection or exception to this remark, and we find no assignment of errors touching remarks by the court. Hence they are not before us for review. Hall v. First National Bank, 133 Ill. 234; Chicago City Ry. Co. v. Carroll, 206 Ill. 318; Hughl v. Monarch Ref. Co., 157 Ill. App. 148.

There was no error in excluding the letters of August 3 and November 3. One was apparently sent to defendant by a sales engineer, who is not a party to the proceeding nor was he a witness upon the trial. The opinion of an outsider, who was not produced in court to be subjected to cross-examination, would be inadmissible. Lemon v. Westeiger Glass Co., 105 Ill. 185. The other letter, dated November 3, was from defendant to plaintiff. While it might have been admitted, its exclusion does not compel a reversal. It is simply a statement that defendant thought the $5,000 which he had paid for the plans was enough, and the letter contained nothing material. Furthermore, the letter was ~~xxxxxxxxxxxxxx~~ a self-serving document, written shortly before suit was commenced.

Upon the entire record a proper verdict was returned and the special verdicts have not been properly challenged. There were no reversible errors upon the trial and the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

76 - 20163

PHILIP B. KAPLAN,
Plaintiff in Error,

vs.

ISAAC STEIN,
Defendant in Error.

237 I.A. 636

ERROR TO SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a suit in equity brought by the complainant, Philip B. Kaplan, against the defendant, Isaac Stein, for an accounting. Stein and Kaplan entered into a contract on September 30, 1918, by the terms of which Kaplan was to purchase and sell silk dress goods and other fabrics, and Stein was to furnish the credit and capital; the net profits of the business were to be divided equally; but it was provided that in case the profits did not equal the debts and liabilities and a loss occurred, Kaplan was to pay Stein one half of the loss. The contract was expressly termed "a contract of hiring" and not a partnership. Subsequent to the execution of this contract a supplemental agreement was executed by the parties on January 11, 1919, in which it was agreed that on all merchandise bought on or after the date of the agreement Stein should receive sixty per cent of the net profits, and Kaplan forty per cent. The business was carried on under the name of the Stein Textile Company.

Prior to the present writ of error an appeal was prosecuted to this court in this case. On the appeal the defendant , Stein, was the appellant (230 Ill. App. 658). The only question involved on the appeal was whether Kaplan was entitled to an accounting. Stein contended that the contract had been terminated by mutual agreement on March 25, 1919. This

court held, in an opinion written by Mr. Justice McSurely, that the contract had not been terminated. In discussing the evidence bearing on that issue Mr. Justice McSurely said:

> "It is impossible to reconcile the variant stories of the witnesses; the true version depends upon their credibility. *** While there are a number of matters which tend strongly to give support to Stein's version of the matter and to throw some doubt upon Kaplan's story, yet we are of the opinion that there are more convincing considerations confirming Kaplan's version."

One circumstance commented on in the opinion was the failure of Stein to produce certain checks relevant to the issue. The court said:

> "There is good reason to believe that these check stubs disappeared from their usual place about the time the witness was requested to produce them. From this failure of Stein to produce evidence which was in his possession, it is proper to presume that it would have sustained Kaplan's story as to the purpose of the $50 payments."

The court affirmed the judgment. ~~and remanded the cause.~~ The cause was referred to a Master for an accounting. After evidence was taken and the cause was argued, the Master died before making a report. The cause was referred to another Master with a stipulation by the parties that the report and conclusions of the second Master should be based on the evidence taken by the first Master. The second Master found that there was a balance due to the complainant amounting to $8,311.87. On the hearing before the court, the court decreed that the total amount to be paid to Kaplan was as follows:

Principal sum found and stated to be due by the Master in Chancery	$8,311.87.
Interest thereon from the 3rd day of May, 1923, being the date said report and account of said Master was filed in this court, to this date, i.e. December 21, 1923, at the rate of 5% per annum	263.18
Master's fee on the prior reference which is hereby taxed	441.00
Clerk's costs in this court paid by the complainant	10.00
Total amount to be paid by the defendant to the complainant	$9,026.05.

From this decree the complainant has prayed the present appeal.

The complainant contends that he is entitled to recover the sum of $32,342.69 with interest from July 26, 1919, and all the costs.

Counsel for the defendant contend that "the decree of the trial court should be affirmed, that the costs in this court should be charged to the complainant, and the court should direct the said complainant to accept the sum of $9626.05 and satisfy the decree without further interest thereon."

Counsel for the complainant contend that the findings of the Master's report and the findings of the decree of the court are based on the books of account; that the books were inadequately and incorrectly kept; that there is a large volume of evidence which is independent of the books and which bears directly on the question of the accounting; that there is no disagreement as to what the books show; that the "whole controversy in the case is outside the books;" that "if the correctness of every fact appearing is to be measured by the entries in the books we there would be no controversy."

The parties began doing business on September 30, 1918, and continued until the business was closed out on November 30, 1919. The evidence is undisputed that from September 30, 1918, to March 11, 1919, the books were so inaccurately and unintelligibly kept that they could not be used as a basis for an accounting during that period. Arthur E. Hall, a certified accountant, who audited the books on behalf of the defendant, testified that there were "no accounts prior to March 11, 1919, other than the mere memoranda here and there through the various records which you cannot get head or tail of." Glen Lee Crawels, a public accountant, who audited the books on behalf of the complainant, testified that "the records during that period prior to March 11, 1919, can be summed up in one

word, - they were not records at all."

The accountants accepted as the profits for the period in question, namely, the period from September 30, 1918, to March 11, 1919, the sum of $573.60. This amount was taken as the profits for that period for the reason that John M. Delson, a public accountant, who was employed by the defendant to open a double entry system of books on March 11, 1919, stated that the defendant and the complainant had agreed that this sum represented the amount of the net profits of the business from September 30, 1918, to March 11, 1919. Delson was a distant relative of the defendant's wife. The complainant testified that he did not make such an agreement, and we believe that his testimony is sustained by a preponderance of the evidence. Hall, the accountant who examined the books for the defendant, testified that he, Hall, knew nothing about the agreement except what was told him; that there were no entries in the records from which he deduced the sum of $573.60; that the sum was accepted as being correct. Delson testified that the complainant was present with the defendant when the books were opened on March 11, 1919, and that he, Delson, discussed the records with both of them. The preponderance of the evidence, however, shows that Kaplan was not present on March 11, 1919, the day that Delson opened the books. Kaplan testified that he was in New York from about March 5th or 6th, 1919, to about March 20, 1919.

Max Schwartz, a clerk of the company, testified that he went to work for the company on March 3rd or 4th, 1919; that the complainant left the next day after he, Schwartz, started to work; that the complainant went to New York and was gone more than two weeks.

Miss Amelia B. Seneca, bookkeeper for the company, testified that she went to work for the company about March 7, 1919; that the complainant was in New York at the time; that Delson showed

her how to keep the books three or four days after she went to work for the company; that Delson opened the books around March 11, 1919; that Delson made the entries in the books as the defendant gave them to him; that the complainant was not there at that time.

The defendant testified on the first hearing before the Master that the complainant went to New York "early in March," 1919, and got back around March 18, 19, or 20, 1919. On the second hearing the defendant testified that the complainant might and might not have been in New York when Delson opened the books. The defendant also testified on the second hearing that before the books were opened by Delson he, the defendant, had a conversation with the complainant and Delson. The testimony of the defendant in this respect is as follows:

> "Q. In that conversation, was anything said about the profits of the business up to that time?
> A. In my recollection it was about $500 or $600.
> Q. I say, was there anything said at that time by Delson or Kaplan or yourself as to how much profit had been made up to that time?
> A. There was some profit. I and Mr. Kaplan showed him a little book or something and by opening up the books it would show on the books whatever the profit was.
> Q. Do you know what entries were made on the books at that time?
> A. Whatever they had they gave it to Mr. Delson. He understood it and he entered it."

The defendant testified further that when the books were opened on March 11, 1919, he gave Delson instructions as to the entries he should make; that he and Delson looked over all the papers and books and "whatever they had in there, the slips of paper, and gave them to Delson to enter everything up." The computations made by Hull from Delson's figures as to sales and purchases from September 30, 1918, to March 11, 1919, showed a profit of about $7103.19. As the defendant gave Delson the entries, the defendant must have known that the profits for the period in question were not $673.60, but were a very much larger sum.

Furthermore the defendant's contention that the profits for that period were only $573.60 is not reconcilable with the facts that during that period the defendant decided to enlarge the business; moved the business into larger quarters; paid more rent; employed Delcan to open a double entry set of books; employed a bookkeeper at a salary of $12.00 a week; and borrowed $30,000 to put into the business. The defendant would hardly have done these things if the profits of the business were only $573.60. Other facts to be considered in this connection are that about March 1, 1919, the complainant at the defendant's suggestion moved a stock of goods belonging to him, the complainant, into the new quarters; devoted his whole time to the business of the Stein Textile Company; and was allowed by the defendant to draw $50 a week against his, the complainant's, share of the profits of the business. It is highly improbable that the defendant and the complainant would have pursued such a course of dendut if the profits had been only $573.60; and it is especially improbable that the defendant would have permitted the complainant to draw $50 a week against the complainant's share of the profits if the profits for about five months had been only $573.60.

In considering the testimony of the witnesses in this connection and throughout the case, it must be borne in mind that neither the Master nor the trial court saw the witnesses testify. The rule, therefore, relating to the advantage that the master and the trial court ordinarily possess in determining the credibility of witnesses by reason of being able to see the witnesses testify is not applicable.

We are clearly of the opinion that the decided weight of the evidence shows that the complainant did not agree that the sum of $573.60 should be accepted as the profits during the period from September 30, 1918, to March 11, 1919. In our opinion the

evidence shows that Kaplan's share of the profits during this period was $3502.68.

The complainant testified, and he is not contradicted, that between September 30, 1918, and January 11, 1919, about $10,000 worth of goods were purchased and about 95 per cent of these goods were sold; that the average per cent of profits on the goods was at least 20 per cent; that the expenses for this period could not have amounted to more than $50. During this period the complainant was, by the terms of the contract, entitled to 50 per cent of the net profits. The complainant's share of the profits then would be $935.00.

From January 11, 1919, to March 11, 1919, according to the testimony of both the complainant and the defendant, about $45,000 worth of goods were purchased. On March 11, 1919, according to the testimony of Hall, the accountant who audited the books on behalf of the defendant, there were goods on hand of the value at cost price of $12,478.00. Subtracting this amount from $45,000, the goods sold between January 11, 1919, and March 11, 1919, amounted to $32,521. The complainant testified that the expenses during this period were about $300; that he, the complainant, delivered the goods. The contract provided that no rent was to be paid and that neither the complainant nor the defendant should receive salaries. Deducting $300 from $32,521, the amount $32,221 is left on which to estimate the net profits, which were 20 per cent. The net profits would be $6444.20. As the complainant's share of the profits between January 11, 1919, and March 11, 1919, by the terms of the supplemental contract were 40 per cent, the complainant's share of the profits for the period in question would be $2577.68. This amount added to the amount of $935, previously estimated, makes $3,502.68, the total amount of the complainant's profits from September 30, 1918, to March 11, 1919.

May 29, 1919, the defendant notified the complainant that he had decided to terminate the contract. No date was fixed by the defendant for terminating the contract, but the defendant said that the business would be continued until the goods on hand were sold. The complainant suggested that to expedite matters a division of the merchandise should be made, but the defendant would not agree to this. The complainant then suggested that the goods should be sold on as short terms as possible, either for cash, or on ten days or thirty days time. The defendant agreed to this, and from that time on the goods were sold on these terms. The complainant repeatedly asked the defendant for an accounting, but the defendant said that he would wait until all of the goods were sold, and could then make a division of the profits. On one occasion the defendant ordered the complainant out of his office. On July 26, 1919, according to the defendant's testimony, the defendant "drove the complainant away" from the store. The defendant testified further that the complainant came back a few days later and that he, the defendant, "drove him off again once or twice;" that one time when the complainant came back he, the defendant, "got a policeman" to take the complainant away.

During the period from March 11, 1919, to July 26, 1919, the net sales amounted to $162,6[illegible].[illegible], and the net purchases were $140,193. The difference between the purchases and sales is $22,5[illegible].20. The expenses for this period are admitted by the complainant to be $3559.29. There are other expenses shown by the books, but there is no evidence except the book entries themselves to support these expenses. Gravels, the accountant who audited the books on behalf of the complainant, testified that as to the other expenses there were no vouchers of any kind.

Miss Sumess, the bookkeeper, testified that she took receipts for all the cash payments made by her; that the receipts were on file in the office when she left there in March, 1920. The defendant testified that he made a search for vouchers and receipts, signed by the person to whom the cash items were paid, and that if any vouchers for petty cash were not produced, he had no idea of what became of them. The evidence is undisputed that the defendant denied the complainant access to the books. The Master expressly found that subsequent to May 30, 1919, the defendant interfered with the complainant in the complainant's inspection of the books, and that finally the defendant wholly prevented the complainant from inspecting the books; that all of the time during which the complainant had no access to the books, the defendant was in full control of the affairs of the business.

Failure by the defendant to produce the vouchers for the entries of expenses raises the presumption that the production of the vouchers would be adverse to the defendant. It was similarly held by this court on the first appeal in the case at bar that the failure of the defendant to produce certain check stubs "gave rise to a presumption against him." In support of the holding the following cases were cited by the court: Hester v. Hester et al., 3 Gil. 119; Montanye v. Reilly, 184 Ill., 203; Hartford Life Insurance Co. v. Sherman, 123 Ill. App. 218; Cartier v. Troy Lumber Co., 130 Ill. 533.

Furthermore, we are of the opinion that in view of the fact that the defendant denied the complainant access to the books, the entries in the books which are unsupported by vouchers, are inadmissible against the complainant. The general rule, as stated by Ruling Case Law, is "that partnership books are admissible in evidence for the purpose of showing the state of the partnership affairs even when the entries are made by one partner

alone, provided that the copartners have access to the books and an opportunity to object to the entries in question." 20 R.C.L. section 153, p. 934. To the same effect is 30 Cyc. 745.

The reason of the rule admitting partnership books is that the books are at all times open to the inspection of the individual partners and that the partners are considered as having acquiesced in the various entries made. Griffin v. Strong, 45 Ill. App. 82, 94.

In the case of Saunders v. Duvall, 19 Tex. 467, in considering the question of the admissibility of partnership books, the court said (pp. 471, 472):

> "There was no error in excluding the defendant's books, when offered in evidence by himself. They were not only of his own creation, but he had denied the plaintiff access to an inspection of them. There was no evidence that they had been regularly and properly kept, but rather the contrary. To have admitted them, upon the defendant's own oath, when it appeared by his statement to the witness that they had not been regularly kept, and when he had refused the plaintiff inspection of them, would have been to allow a party to manufacture evidence for himself."

Counsel for the defendant contend that the agreement between the defendant and the complainant did not constitute a partnership. Whether it did or not, the enterprise partakes so closely of a partnership that the rules governing partnerships are applicable. Chapman v. Stewart, 103 Ill., 541, 543; Hull v. Parsons, 145 Ill. App. 436, 438; Slater v. Clark & Co., 68 Ill. App. 433, 437; Edwards v. Hudson, 165 Ill. App. 521, 523.

In accordance with our view the only expenses that should be deducted from the net sales of $23,303.20 amount to $3359.29. The difference, $19,943.91, is the net profit of the period between March 11, 1919, and July 26, 1919. The complainant's share of these profits, estimated on the basis of 40 per cent, amounts to $7,977.56.

After the defendant excluded the complainant from the

premises on July 26, 1919, the defendant had exclusive possession of the goods and conducted the sale of them. All of the goods were finally disposed of by November 30, 1919. The complainant had no access to the books. We are of the opinion, therefore, as previously expressed, that in such circumstances the entries in the books were not competent evidence against the complainant to show the profits of the business during this period; and that the profits may be estimated by evidence independent of the books. On July 26, 1919, according to the testimony of the complainant, the goods on hand amounted to $35,000; that this amount included $3500 worth of velvetines, $7500 worth of woolen goods, and $24,000 worth of silks. The complainant's testimony is not contradicted. The defendant testified that on that date the amount of goods on hand was between $30,000 and $36,000. Moreover, there is evidence tending to show that in September, 1919, goods were sold to William Goodrich amounting in value to $1245.86, and to Isador Hector amounting in value to $1580.47. There is no record of these sales in the books.

Gravels testified that the average profits on all of the sales from March 11, 1919, to November 30, 1919, was 21½ per cent. At this rate, the profits realized on the $35,000 worth of goods was $7,525.

The contract provided that at the termination of the contract all stock on hand should be sold or divided, as the parties should agree, all outstanding accounts collected, all bills and liabilities paid, and the net profits divided equally between the partners. On this basis the complainant is entitled to one-half of $7,525 plus $35,000, which equals $21,762.50. In estimating this amount we have made no allowance for any expenses that may have been incurred in disposing of the goods for the reason that the only evidence of expenses is what the book entries show; and we have held that these entries are not admissible against the complainant, be-

cause he was denied access to the books. Whatever expenses were incurred as judged by previous expenses would not have been of any large amount.

There is a charge in the books during the period in question of an item of $1700 for the services of the defendant's son-in-law, named Gurwitt. The Master disallowed this item on the ground that the "preponderance of the evidence" showed that "Gurwitt did not do any work" for the company. We think the finding of the Master is correct. A claim of $2,000 was made by the defendant for his services in liquidating the business after the complainant was excluded. The Master disallowed this claim. We concur in this finding, as the contract provided that neither of the parties should be entitled to any compensation for services. A charge of $1966.53 was made by the defendant for rent. The Master disallowed this claim on the ground that the contract provided that no rent should be charged. We think that the finding of the Master is correct.

Counsel for the defendant assert that on July 26,1919, the Stein Textile Company owed the Central Trust Company Bank $36,000. On direct examination Hall testified on behalf of the defendant that subsequent to July 26, 1919, $36,000 was paid to the bank, and that that amount represented amounts advanced by the bank to the Stein Textile Company. On cross-examination Hall testified that the payment of the $36,000 to the bank did not change the condition of the account at all. His explanation of this was as follows: "In the course of business a concern may go down to the bank and borrow money. Now if they borrow that money and use it in the business and afterwards pay that money back it does not affect the profit and loss. It is simply increasing the capital through the use of the bank loan."

On the total amount which the trial court directed the defendant to pay to the complainant the trial court allowed

interest from May 3, 1923, the date on which the Master's report was filed in court, to December 21, 1923.

Counsel for the complainant contend that interest should be computed from July 26, 1919, the date on which the defendant excluded the complainant from the business and took exclusive possession of the goods, books and management of the business.

In Robbins v. Laswell, 48 Ill. 203, in considering the question of interest the court said (pp. 205, 206):

> "We are also of opinion, as stated at the last term, that interest should be charged against Laswell on the balance due, from the termination of the partnership. His conduct in driving off the stock, as formerly intimated by the court, was very censurable, and from that time to the present he has contested the right of Robbins to recover any amount whatever."

In the case of Kerogan v. Cunningham, 81 Ill. 116, the court said (p. 113):

> "Under the agreement the account ought to have been taken on the first day of July, 1872, and the amount found due paid to complainant; but defendant refused to render any account, or to allow any access to the books of the firm. It was his contract, in writing, to render the account and pay whatever amount should be found to be due. Having failed to do so, under the decision in Berry v. Gage, 36 Ill. 27, there was no error in allowing complainant interest on the amount found due, from the time the account ought to have been taken up to the date of the decree."

In the case at bar we think that interest should be allowed from July 26, 1919, to the date of the entry of the judgment on this appeal.

Counsel for the complainant contend that the trial court erroneously taxed the complainant with one-fourth of the costs.

In the case of Babcock v. Farwell, et al., 199 Ill. App. 512, the court said (pp. 514, 515):

> "It is well settled that costs are taxed against the losing party unless some good, sufficient and equitable reason exists for apportioning them; and unless it can be said that the court abused a sound discretion which the law reposes in it in deciding which of the parties shall be compelled to pay the costs, a court of review will not interfere with the trial court's judgment."

In the case of Keller v. Eading, 163 Ill. 152, the court said (p. 154):

> "The claim asserted by appellants to this fund rendered the filing of this bill necessary on the part of appellees. Appellants did not disclaim, but by their demurrer denied the right to relief. They were actively contesting the right of appellees to have a decree, and the costs were properly awarded against them."

In the case of Peoples Gas Light and Coke Company v. Gibbons, 219 Ill. App. 382, the court quoted with approval from 11 Cyclopaedia of Law and Procedure, p. 35, as follows:

> "The general rule that costs follow the result of the suit will not be departed from where the conduct of the losing party has been the chief cause of a large accumulation of costs."

In the case at bar the complainant was the successful party. Moreover, he was refused an accounting by the defendant; was denied access to the books, and was forced to bring this suit to obtain an accounting. Furthermore, the right of the complainant to an accounting was contested by the defendant on the ground that a settlement had been made between him and the complainant; a reference was had to a Master to determine that issue. The Master reported in favor of the complainant and the Master's report was confirmed by the trial court. An appeal, to which we have previously referred, was taken to this court and the decree of the trial court was affirmed. We think that these facts in regard to the former appeal should be considered with the facts on the present writ of error in determining the question of costs on the present writ of error. In our opinion all of the costs should be taxed against the defendant.

The estimated amounts which we have previously indicated, namely, $3502.68, $7577.36, $21,262.50, total $32,342.74.

The judgment is reversed and the cause remanded with directions to the trial court to enter a decree in favor of the complainant in the sum of $32,342.74, together with interest as

heretofore indicated, and for such other proceedings as may not be inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED.

McBurney, P. J., and Matchett, J., concur.

124 - 20215

4366

ANNA HOLMES,
Appellee,

vs.

BERTHA M. CARRA,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I.A. 636

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff, Anna Holmes, to recover damages from the defendant, Bertha M. Carra, for the alleged conversion by the defendant of certain household goods belonging to the plaintiff.

The case was heard by the court without a jury. The court found in favor of the plaintiff and entered judgment for the sum of $3972.50. From the judgment the defendant prosecutes this appeal.

The evidence shows that the defendant leased to the plaintiff an apartment in a building owned by the defendant. Upon the expiration of the plaintiff's lease the plaintiff left the apartment and the defendant leased the apartment to K. H. McConnell, the son-in-law of the plaintiff. McConnell occupied the apartment with his family. All of the household goods of the plaintiff remained in the apartment during the time of McConnell's occupancy. When McConnell left the apartment he gave the keys to it to the janitor, told him to take care of the place, clean up everything, and that he, McConnell, would write to him. McConnell left all of the household goods in the apartment. The goods have never been removed by either the plaintiff or McConnell.

It is the contention of the plaintiff that the defendant converted the goods to her own use.

Counsel for the defendant maintain that the evidence does not show a conversion.

The general rule is that any distinct act of dominion wrongfully exerted by a person over the property of another in denial of the other's right, or inconsistent with it, is a conversion. Folletti v. Edwards, 30 Ill. App. 386, 387; Gannon v. Bemis, 38 Ill. App. 37, 44.

An itemized list of the articles left in the apartment by the plaintiff was filed with the statement of claim. Ada Vastine, a friend of the plaintiff and of the McConnells, testified that she was at the apartment the day the McConnells left; that she knows exactly what was there; that she could name every article of furniture without a list; that the McConnells left the apartment just as she saw it when the plaintiff had it.

Joseph H. Sikora, the janitor, testified that he gave the keys of the apartment to the defendant after the McConnells left; that nothing was taken out of the apartment after he gave the keys to the defendant; that the defendant told him that if anybody asked him "about the furniture to say that somebody took them out."

Paul S. Groerkin, an attorney at law, testified that he represented the defendant in "certain matters;" that he visited the apartment after McConnell left it; that he thinks he saw the defendant there; that he made an inventory of the articles found there; that he sent the inventory to McConnell and that he wrote McConnell asking for the payment of rent due to the defendant. The inventory and the letter were introduced in evidence. The letter stated that the personal property found in the apartment, as shown by the inventory, had been seized and would be held subject to the payment of the rent with reasonable charges for storage; that unless the obligation was taken care of within a reasonable time the property would be advertised and sold.

Timothy S. Riley, an attorney at law, testified that

he made a demand on the defendant on behalf of the plaintiff for the household goods left in the apartment by McConnell; that the defendant refused to turn over any of the goods; that the defendant said, "I can't turn over the property to Mrs. Holmes, and furthermore, I would not if I could. The contents of the room were stored in the basement and all the clothing in the room was put in one trunk and the last time I was in the basement the furniture had disappeared. The linens that were left there after the trunk was loaded were taken and used by myself." Kiley further testified that the defendant refused to let him go in the basement. He also testified that he made a demand on Crearkin on behalf of the plaintiff for the goods.

Forrest G. Smith, an attorney at law, testified that he mailed a letter to the defendant in regard to the property. The letter was introduced in evidence. In the letter it was stated that Smith represented the plaintiff; that he had been informed by the plaintiff that the defendant had taken possession of the property left in the apartment by McConnell; that he would remove the property at the convenience of the defendant; that the defendant by holding the property would be liable for the full value of the property.

The defendant testified that she never had a conversation with Sikora, the janitor, in which she told him if anyone asked about the furniture to say that somebody took it away. She also testified that she did not know the attorney Kiley, and did not know of the conversation that he testified he had with her. She testified further that she had an attorney at one time by the name of Paul C. Crearkin, but that she never employed Crearkin to represent her against the plaintiff or McConnell; that she saw Crearkin at the apartment; that he was her attorney at the time;

that she did not know whether he made an inventory of the property. She further testified that she did not know of any letter to her by Forrest G. Smith, in which a demand was made for the furniture. She testified further that the furniture was left in the apartment for awhile; that then some of it was taken out and put in different places; that some was put in the basement and some in another apartment; that she did not know the property was owned by the plaintiff; that she has been willing at all times to deliver the furniture to anybody who might ask for it.

We are clearly of the opinion that the preponderance of the evidence shows a conversion of the property by the defendant.

Counsel for the defendant assign as error the refusal of the court to allow the motion of the defendant to amend her affidavit of merits so as to show that all of the articles mentioned in the statement of claim were in fact not found in the apartment.

We think that the court should have allowed the motion, but that on the record the refusal to allow it was not reversible error. The court did not rule that the defendant could not show what property was left in the apartment. The defendant was permitted to testify in regard to what property was left in the apartment by McConnell. She testified that she showed the property to M. Seeberg, a furniture dealer, who went to the premises to make a valuation of the property. She described the specific articles that she pointed out to Seeberg. A list of the property which the defendant showed to him was made by Seeberg, and the list appears in evidence. Furthermore the inventory that Crearkin made was introduced in evidence. It will thus be seen that the defendant was allowed to show what property the defendant contended was left in the apartment by McConnell. The de-

fendant was not harmed, therefore, by the refusal of the court to allow her to file the amended affidavit of merits.

Counsel for the defendant contend that the finding of the court as to the value of the property was not warranted by the evidence. According to the plaintiff's testimony the property was worth over $4,000. According to the testimony on behalf of the defendant the value of the property was insignificant. Seeberg, on behalf of the defendant, estimated the value at $160. The defendant testified that the property was "junk of the worst kind." From an expression of the court in regard to the question of the value of the property it appears that the court was not entirely satisfied with the state of the evidence. We think the court fixed the value at too high an amount. If within ten days from the filing of this opinion the plaintiff will remit $1272.50, we will affirm the judgment for $2,000. Otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;

OTHERWISE REVERSED AND REMANDED.

McSurely, P. J., and Hatchett, J., concur.

144 - 29233

436 Ia

SHERLEY KARPEN,
Appellee,

vs.

ELMER JONES,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

237 I.A. 636

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, Sherley Karpen, to recover damages for injuries alleged to have been caused by the negligence of the defendant, Elmer Jones, in a collision between two automobiles.

The case was tried before a jury, and the jury returned a verdict in favor of the plaintiff in the sum of $2300. The plaintiff remitted $600 and judgment was entered for $1700. From the judgment the defendant has prosecuted this appeal.

Counsel for the defendant contends that there was no negligence on the part of the defendant; that "the collision occurred through the latent and undiscoverable defect in the automobile."

At the time of the collision the plaintiff was one of seven occupants of an automobile going west on Jackson boulevard, an easterly and westerly thoroughfare in the city of Chicago. The defendant was the only occupant of an automobile which he was driving east on Jackson boulevard. The principal witnesses who testified on behalf of the plaintiff were two occupants of the automobile in which the plaintiff was riding, and two taxicab drivers who were driving their cabs near the scene of the accident. The testimony of these witnesses in regard to the material facts was substantially the same. Their testimony was to the effect that the defendant was going at the rate of about 30 miles

an hour; that he was driving in "a zig-zag manner" from one side of the street to the other; that when he collided with the automobile in which the plaintiff was riding he was on the north or wrong side of the street; that his breath smelled of whiskey, and that he appeared to be drunk.

The only witness who testified on behalf of the defendant as to the way in which the accident occurred was the defendant himself. He testified in substance that he was driving about twenty or twenty-two miles an hour, and that the other automobile was going at the same rate of speed; that his automobile seemed to steer to one side of the street; that he saw the other automobile coming; that he seemed to have no control over his automobile, that is, to turn it away; that he saw that he was going to hit the other automobile; that there were no "ifs and ands or get away about it;" that he put on the emergency brakes and they didn't even stop him; that it seemed that every move he made to stop the faster the went; that he knew he was going to hit the automobile; that there was no getting away from it; that he went right for them and there was no way of stopping it; that there was "no possible chance in the world" of his stopping his automobile even if he applied the brakes. He testified further that he was not drunk; that he had not had any liquor at any time during that day. Friends who dined with him that day and who were with him shortly before the accident testified that he had not drunk any liquor while he was with them and that he was sober when they left him.

We are of the opinion that the act of the defendant was clearly the proximate cause of the collision. But counsel for the defendant contends that the defendant is not liable on the ground of negligence because the collision was due to a

latent defect in the automobile.

The facts on which counsel for the defendant rely to support his contention are as follows: On cross-examination of the defendant in answer to the question, "What was the matter with your car other than your axle being sprung?" the defendant made the following answer: "The bolt that goes down through the axle that supports the steering knuckle, that is the part of that that the front wheel sits on, that is supported on top by a timken bearing; on top of this pin is a grease cup to force hard grease in, just a thumb cup. Now they construct them with the Alemite System so you can force the grease in there. I had put grease in there, but you could never see whether it went down in the steering knuckle or not, or into the bearings, and consequently when they came to take this out, this bearing was frozen to the pin; what I mean by frozen was in so tight on there for the want of grease." A blacksmith who repaired the defendant's automobile testified as follows: "The pin that goes through the knuckle and through the axle and through the support bearing was froze in, and I have to use a sledge to drive the pin out from that axle. The bearing was pretty dry, all rusty. There was grease in the grease cup, only it was frozen right on the bottom, it won't get through. That could not be seen from the outside; * * if you steer the car to one side it is pretty hard to steer it on another.

The general rule in regard to latent defects is that a person is not liable for injuries to others resulting from a latent defect in the instrumentality causing the injuries if he was ignorant of the defect and could not have discovered the defect in the exercise of reasonable care and diligence. The Columbus Chicago Company v. Troesch, 68 Ill. 545, 552; Sanden v. Hannan, 85 Ill. App. 17, 18.

In the case at bar the question whether the defect in the automobile of the defendant was a latent defect of which the defendant was ignorant and which could not have been discovered by reasonable care and diligence, was a question for the jury to decide. Furthermore, the defendant testified that about two weeks prior to the collision he had an experience with his automobile similar to the one in question, but that he did not pay any attention to it at the time. Whether reasonable diligence would have required him to give the matter attention and to inspect the automobile, or to have it inspected, were questions for the jury to determine. We think there is ample evidence to sustain the finding of the jury that the defendant was guilty of negligence.

Counsel for the defendant further contend that the damages are excessive.

The evidence on behalf of the plaintiff shows that the plaintiff fainted at the time of the collision; that she was taken home and put to bed; that a physician was called immediately; that the plaintiff's left ankle, shoulder, and right wrist were dislocated; that she had a contusion on her right knee; that the lower part of her back was bruised; that she had some cuts on her face, scalp and hands, and some bruises on different parts of her body; that the ankle, shoulder and wrist were pulled in place and strapped; that the knee joint developed an inflammation of the synovial membrane; that the knee joint was strapped for several weeks and electrical massage given; that the plaintiff menstruated the day after the accident, suffered severe pain and was given a hypodermic of morphine; that her menstruation has been irregular and painful ever since the accident. The evidence on behalf of the plaintiff shows further that she could not walk for five days after the accident; that before the accident she was employed as a bookkeeper for her father at a salary of $25 a week; that she was

unable to return to work for about ten or twelve weeks.

On behalf of the defendant a physician testified that he called at the home of the plaintiff about a week after the accident; that he saw the plaintiff; that she was dressed and going about the house; that he examined a bruise and a sprain on the back of the right hand; that the plaintiff told him of a bruise on her hip, which she did not show him; that his recollection is that he saw no bruises on her body or bandages on her head or ankle; that the only evidence of injury that he found was the bruise on the hand and the sprain in the middle finger; that there was no apparent dislocation of the shoulder, ankle or wrist.

The plaintiff in rebuttal testified that the physician did not examine her; that she never saw him before the trial; that the first time that she ever saw him was when he testified at the trial.

We are of the opinion that there is sufficient evidence to sustain the amount of the verdict of the jury as remitted by the plaintiff.

Counsel for the defendant further contends that the court erred in giving a certain instruction on behalf of the plaintiff. The instruction is not set out in the brief of counsel for the defendant. Counsel says that the instruction appears on page 75 of the abstract and on page 331 of the record. The instruction on page 75 of the abstract merely relates to the burden of proof, and obviously is not the instruction counsel is objecting to. We have examined the instruction on page 331 of the record and we do not think that there is any language in it which would justify us in reversing the judgment.

We are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

212 - 29301

JOHN F. FAY,
Appellee,

vs.

JACOB MILLER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 637

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The plaintiff, John F. Fay, brought an action against the defendant, Jacob Miller, to recover damages for injuries received by reason of the alleged negligence of the defendant. The case was tried before a jury and the jury returned a verdict for the plaintiff in the sum of $5000. From the judgment on the verdict the defendant has prosecuted this appeal.

All of the grounds on which the defendant asks for a reversal relate to the evidence.

The plaintiff occupied as a tenant a part of a building owned by the defendant. There were two entrances to the part of the premises occupied by the plaintiff. One entrance was by means of a stairway at the head of which was a landing. This landing was the roof of a storeroom which was owned and used by the defendant. About May 21, 1921, the defendant had the landing covered with "an ordinary four-ply tar and felt composition and gravel roof." In doing the work the roofing contractor, in order to prevent the accumulation of ice and water between the paper and the concrete, projected the paper beyond the edge of the landing. June 9, 1921, while starting down the stairway the plaintiff fell and was injured.

The plaintiff testified in substance that there were eleven steps to the stairway; that there was no handrail around the stairway; that about three o'clock p. m. he went out of the

door of the room leading to the stairway, started to go down the steps of the stairway, and stepped on what he thought was the edge of the top step, but which was in fact the projecting paper; that the paper extended about four inches beyond the top step, and that the paper turned down as he stepped on it and he was thrown to the bottom of the stairway; that he lit on his heels; that he was lying there a little while before he came to; that he crawled out of the back yard on his hands and knees to the front of the house, so that someone would see him; that a man picked him up and carried him into the house; that his legs were injured; that immediately after the accident a doctor was called and gave him treatment for his injuries; that at the time of the accident he was working in the auditing department of a firm at a salary of $30 a week; that he was absent from work eleven months as a result of the accident; that he now walks with a limp, has to use a cane, and has to put a rubber sponge in his shoes; that he is 60 years old; that the defendant did not consult him before having the roofing put on the landing; that he did not have any knowledge of the roofing on the landing before it was done; that he did not talk to the man who put the roofing on; that he heard that the roofing was being put on it but he had not seen it. The plaintiff further testified that he did not look at the stairs at all as he started down the steps; that he walked right over to the top step from the door; that he did not notice that the paper overlapped.

George G. Knight, an inspector of buildings for the City of Chicago, testified that he examined the stairway June 10, 1921, and that the paper projected about three or four inches beyond the landing. Miss Ora B. Cousins testified that she saw the plaintiff trip and fall; that she went to his assistance and stayed with him until he was taken in the house; that the plain-

tiff was absent from work a trifle over eleven months; that she lived with the plaintiff and his wife; that she saw him every day; that she never saw him carry a cane before the accident; that she never saw him intoxicated; that she did not smell liquor on his breath at the time of the accident.

Dr. Michael J. Purcell testified that he treated the defendant for the injuries; that on examination he found his feet and ankles apparently deformed; that both the feet and ankles were swollen; that there was subcutaneous hemmorhage; that the heel bone was out of place; that there were no fractures, only dislocations; that he put the plaintiff's feet in casts for seven weeks; that the customary charge for his services would amount to $400.

On behalf of the defendant Alexander Farrier testified that he saw the plaintiff sitting in the alley; that Miss Cousins was there; that he asked the plaintiff what was the matter; that plaintiff said he slipped on a pebble but caught himself with his arms; that the plaintiff said he could not get up; that he, the witness, carried him into the house; that he, the witness, had seen the stairway a day or two before the accident; that the paper lapped over the edge of the step two or three inches.

Mrs. Alexander Farrier testified on behalf of the defendant that she saw the plaintiff just after the accident, and told her husband to go out and ask him what was the matter; that she never saw the plaintiff walk normally; that he always walked kind of slow and kind of pulled his feet along or dragged them; that he did not always use his cane after the accident; that she saw him putting coal in the furnace and he did not use his cane; that he attended to the furnace daily and took care of the hot water apparatus part of the time.

Dr. J. Whitney Hall testified on behalf of the defend-

ants that on the facts assumed he could not conceive of a heel bone being dislocated without breaking it by a sudden blow; that he had observed the plaintiff walk and that he walked as if he had a short leg; that sponges in a man's shoes would help for corns or bunions.

Charles J. L. Barker, the roofing contractor who put the roof on the landing, testified on behalf of the defendant that the paper extended beyond the landing about an inch and a half at most; that as soon as the tar hits that projection, or the wind or rain strikes it, it will drop over in about twenty-four or thirty-six hours; that in case the weather is very hot, it may not take more than an hour or two before it laps over and will stick tight to the concrete below; that the plaintiff saw him putting the roof on and complained to him that the tar would track up his flat; that he, the witness, saw the plaintiff after the accident and that plaintiff said, "I fell down the damned stairs. I am going to make that damned Jew pay for it;" that the plaintiff said he slipped on the paper.

The defendant testified that he saw the plaintiff after the accident and that the plaintiff told him he stepped on a pebble and slipped down the steps; that the "damned roofer" put the gravel on and that he, the plaintiff, told him not to do it.

Simon Frovus testified that he was a barber and that the plaintiff used to get shaved in his shop; that the plaintiff was always kind of crippled; that he always walked with a cane; that he does not walk now any worse or any better than he did; that six weeks after the accident he and the plaintiff talked about the accident; that he, the witness, said you got shaved that day; that the plaintiff said he believed the accident occurred after he had been shaved; that the plaintiff was shaved

between two and three o'clock p. m.; that at that time he, the plaintiff, was intoxicated; that his breath smelled of whiskey.

In rebuttal Edward J. Horne testified that he worked for the same firm that the plaintiff did; that prior to the accident he never saw the plaintiff use a cane; that he appeared to walk normally; that he did not drag one foot after the other; that he saw the plaintiff at one o'clock p. m. the day of the accident; that the plaintiff was perfectly sober.

The plaintiff testified in rebuttal that Charles J. Marker, the roofing contractor, did not call at his residence; that he never saw him until he, Marker, took the witness stand; that he did not tell Marker that he was going to make "the damn Jew" pay for it; that he did not have a conversation with Simon Provus, the barber, about the accident; that he, the plaintiff, has not taken a drop of liquor, whiskey, or wine in the last four years.

Counsel for the defendant contends that the trial court erred in not giving an instruction requested by the defendant to find the defendant not guilty. The trial court should have given such an instruction only if the evidence did not tend to establish a cause of action. In the case of Mirich v. Forschner Contracting Co., 312 Ill. 343, the court held (p.356) that if there was evidence tending to establish a cause of action "the case must be submitted to the jury, even though the greater weight of the evidence may have seemed to the court to be on the side of the defendant;" that "it has always been recognized that for a trial court to weigh and determine conflicting evidence and direct the jury what verdict to render would be a direct violation of the constitutional right to trial by jury."

We are clearly of the opinion that the evidence in the case at bar tends to establish a cause of action. We are also of the further opinion that the evidence is sufficient to sustain the verdict of the jury that the defendant was guilty of negligence.

Counsel for the defendant contends that the plaintiff "failed to show absence of contributory negligence on the part of the plaintiff."

The general rule in regard to contributory negligence is stated in the case of Kelly v. Chicago City Ry. Co., 253 Ill. 645, as follows:

> "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Hale v. Chicago Junction Ry. Co., 259 Ill. 476) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

We do not think that the evidence in the case at bar shows as a matter of law that the plaintiff was guilty of contributory negligence. In our view the question of contributory negligence was one of fact for the jury, and there is sufficient evidence to sustain the finding of the jury that the plaintiff was not guilty of contributory negligence.

Counsel for the defendant further contend that "the amount of the verdict is contrary to the weight of the evidence as to the extent of the plaintiff's injury."

In this contention we agree with counsel for the defendant. We think that $4,000 will be a fair and reasonable compensation. If within ten days from the filing of the opinion the plaintiff will remit $1,000, we will affirm the judgment; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

McCurely, P.J., and Matchett, J., concur.

258 - 29347

JAMES S. DEERING, Administrator of the Estate of JAMES L. MORRIS, Deceased,
Appellee,
vs.
CITY OF CHICAGO, a Municipal Corporation,
Appellant.

237 I.A. 637

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the City of Chicago, from a judgment on the verdict of a jury in the Circuit court of Cook County in the sum of $10,000, for the death of a boy nine years and seven months of age, alleged to have been caused by the negligence of the defendant.

There is no dispute about the material facts.

The deceased lived with his parents at 3437 North Claremont avenue, a street in the city of Chicago. On the northeast corner of Claremont avenue and Cornelia street there was a poplar tree, the diameter of which was about 12 to 15 inches, and the height of which was estimated by one witness at 20 to 35 feet and by another witness at 45 to 50 feet. The tree was in the public street in a grass plot, and it had been there for a number of years. About 20 feet above the ground and about 12 to 14 inches from the trunk of the tree two electric wires, about 12 inches apart, ran through the branches of the tree and were used by the defendant in carrying electricity for the purpose of lighting the streets. There was insulation on the wires consisting of a kind of composition of paint, cloth and tar. The purpose of the insulation was more for protection of the wire from corrosion than it was for insulation. As long as the insulation was dry it was a protection on low voltage wire, but on high voltage it was no

protection at all. The voltage in the wires was about 2150 volts. There is uncontradicted evidence that on the day of the accident the insulation on the wires in the tree was completely worn off in spots; that there were spaces on the wires of about 4 feet where the insulation was worn off; that the wires in one place for at least 24 to 36 inches were stripped bare; that in another place the insulation or weatherproof covering on the wires hung down in threads.

On the evening of the accident the deceased was playing with some boys near the tree in question. It had been raining and the tree was wet. One of the boys had been flying a kite, which got caught in the branches of the tree, and the tail or string of the kite was wrapped around the wires in the tree. When the kite got caught in the tree the boy who had been flying it said, "Who wants the kite can have it," and then left for his home. This was a little after dark, about 7:30 or 8 o'clock in the evening. The deceased heard the remark, climbed the tree to get the kite, came in contract with the wires and was instantly killed. One of the boys saw a "flash" while the deceased was up in the tree, saw the deceased hanging in the tree, and ran to tell the parents of the deceased. The father of the deceased climbed the tree and got the body of the deceased.

Some of the companions of the boy testified that they had seen boys climb the tree in question, and others testified that they had not seen any boys climb the tree. There was evidence that at times sparks could be seen in the tree at night, particularly after a rain. The father of the deceased testified that about four and one-half years before the accident he lived directly across the street from the tree and that on rainy nights he had seen "a shower of fireworks in the tree, just as though it was a demonstration on the Fourth of July." One of the

boys testified that he saw sparks in the tree before the deceased climbed it on the evening in question. The mother of the deceased testified that she never saw the deceased climb the tree before the accident; that when the boys "were climbing around" she "chased them from trying to climb that tree and other trees around there" because she knew it was dangerous. The uncle of the deceased testified that he always spoke to the deceased about climbing and had warned him against it.

We are clearly of the opinion that the evidence establishes a cause of action and that the evidence is sufficient to justify the jury in finding the defendant guilty of negligence. Stedwell v. City of Chicago, 214 Ill. App. 642; Rudil v. City of Chicago, 222 Ill. App. 629.

Counsel for the defendant maintain that "contributory negligence is the outstanding feature of this case."

The rule in regard to the degree of care which the law requires of a child is that such care only is required as reasonably might be expected from one of its age and intelligence. Chicago & Alton R. R. Company v. Nelson, 153 Ill. 89, 93. Sherman & Redfield state that "In nearly all the cases the power and duty of any child between three and twelve years of age, to exercise care for its own protection, is held to be for the jury." Sherman & Redfield on The Law of Negligence, vol. 1, section 73a, pp. 187, 188, (6th ed.)

The general rule in regard to contributory negligence is stated in the case of Kelly v. Chicago City Ry. Co., 283 Ill. 640, as follows (p. 645):

> "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co., 259 Ill. 476), but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

We are of the opinion that the evidence does not show, as a matter of law, that the deceased was guilty of contributory negligence; that the question whether he was guilty of contributory negligence was one of fact for the jury; and that there is sufficient evidence to sustain the finding of the jury that he was not guilty of contributory negligence.

Counsel for the defendant contend that the court erred in giving certain instructions on behalf of the plaintiff. All of the instructions objected to are not set out in the brief. Two of them are designated as Nos. 135, 193. That is not the proper way to present instructions for consideration by this court. The instructions objected to should be set out in full in the brief. General Platers Supply Co. v. Charles F. L'Hommedieu & Sons Co., 228 Ill. App. 201, 206. We have examined the instructions, however, and we do not think that they are erroneous. One of the instructions is objected to by counsel for the defendant because it mentions the maximum amount of damages the jury may allow under the statute. The instruction is in the language of the statute, and the rule is well settled that ordinarily such an instruction is not erroneous. Greene v. Fish Furniture Co., 272 Ill. 148, 157; Mertens v. Southern Coal Co., 235 Ill. 540, 541; Kellyville Coal Co. v. Strine, 217 Ill. 516; Donk Bros. Coal & Coke Co. v. Peton, 193 Ill. 41, 43, 44.

The fact that an instruction mentions the amount of the damages that may be allowed is not error unless there is something in the instruction which tends to lead the jury to understand that they ought to or may allow the full amount. Central Ry. Co. v. Bannister, 195 Ill., 44, 53; Kellyville Coal Co. v. Strine, supra, (p. 533.) There was nothing in the instruction in the case at bar that would lead the jury to believe that they should allow the full amount.

Another instruction is objected to by counsel for the defendant because it told the jury that in estimating damages they were not confined to the value of the services of the deceased to his next of kin until he reached the age of 21 years, but that the jury might consider the pecuniary benefit, if any, which the jury believed from the evidence the next of kin would have derived from the deceased had he not been killed at the age of his life. This form of instruction has been approved by the Supreme Court. Baltimore & Ohio Southwestern R. R. Co. v. Thom, 159 Ill. 535, 536; U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 534.

Another instruction is objected to by counsel for the defendant because it uses the word "child;" and counsel maintain that it was not proper to refer to the deceased, who was nine years and seven months of age, as a "child."

The answer to this objection is that in an instruction given at the request of the defendant the word "child" is used. The rule is that a party cannot assign error as to the giving of an instruction when substantially the same instruction has been given at his own request. Brinie v. Nelson Mfg. Co., 267 Ill., 11, 13.

Counsel for the defendant further contend that the verdict is excessive. We do not think that the verdict is excessive. In the case of Foreman Bros. Banking Co. v. McInerney et al., 226 Ill. App. 647, the court said that "It has been repeatedly held that in case of a death of a person of tender years and unformed habits, the question of damages is left entirely to the discretion of the jury, and that no verdict in such a case within the statutory limits can be held excessive by a reviewing court."

We think the judgment should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

291 - 29380

T. V. BECKWITH, Doing Business as the Snyder-Beckwith Co.,
Appellee,

vs.

DAVID F. CURTIN,
Appellant.

237 I.A. 637

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, T. V. Beckwith, doing business as the Snyder-Beckwith Company, against the defendant, David F. Curtin, to recover from the defendant a commission for the sale of real estate, alleged to be due to the plaintiff under a contract with defendant.

The case was heard by the court without a jury. The court made a finding in favor of the plaintiff in the sum of $3,000. From the judgment on the finding the defendant prosecuted this appeal.

By the terms of the contract the defendant gave the plaintiff the exclusive agency for three months to sell certain real estate owned by the defendant, situated on Sheridan Road in Chicago. The price fixed by the defendant was $125,000. The plaintiff was to be paid the rates of commission established by The Chicago Real Estate Board. The plaintiff agreed to list the property for sale with The Chicago Real Estate Board and to use his best efforts to sell the property. The contract contained the following agreement on the part of the defendant.

> "I agree to pay you the rates of commission as established by The Chicago Real Estate Board, whether such sale be made by you or me, or by any other person acting for me in my behalf, upon the terms mentioned on the reverse side hereof, or upon any other terms acceptable to me, or if it is sold within three months after expiration of this contract to any person or persons with whom you have had negotiations during the term of your agency and whose name or names have been disclosed to me."

After the execution of the contract the plaintiff made efforts to sell the property but did not succeed in procuring a purchaser. While he was negotiating with a prospective purchaser the plaintiff went to West Baden, where he remained for two weeks. While he was there the defendant sold the property himself for $100,000. The sale was made within three months from the date of the contract. When the plaintiff returned to Chicago he had a conversation with the defendant about the sale of the property. The plaintiff testified that he met the defendant in front of the Edgewater Beach hotel by accident; that he, the defendant, said, "I guess I owe you a commission;" that he, the plaintiff, said "All right, Mr. Curtin, any time. What did you get for that property?" that the defendant said "I got $100,000;" that he, the plaintiff, said "That is pretty cheap; you didn't get enough for it;" that the defendant said "I got a little more for expenses and to cover things like that; I will fix up on the commission. I am coming down to the office;" that later on the defendant asked the plaintiff if he would endeavor to purchase for him, the defendant, twenty-five feet of ground from Mrs. Helen F. Pierson; that he, the plaintiff, called at the defendant's house and reported that Mrs. Pierson was ill; that at this time the question of the commission came up again; that the defendant said, "I think I owe you a commission. I am going to give you $1000;" that he, the plaintiff, said, "That don't seem just fair in view of my contract. I think I am entitled to a little more than that;" that they discussed the question why he, the plaintiff, was entitled to a little more, and that the defendant agreed that he, the plaintiff, was entitled to more; that he, the plaintiff, said, "But you think it all over and come down to the office. I think you will feel different about it;" that the defendant came to the office, took out a check book and "made 15;" that he, the

plaintiff, said, "What are you going to do?" that he, the plaintiff, knew it was $1500; that he, the plaintiff, said, "Let's discuss this a little;" that there was no discussion; that that was the end of it.

The defendant testified that the plaintiff did nothing to procure a purchaser; that the first conversation he had with the plaintiff about the matter of the commission was at the plaintiff's office; that he, the defendant, said, "I am going to give you a check for your commission;" that he, the defendant, took out his check book and wrote $1500; that the plaintiff said he would not accept that amount; that the defendant said, "You will never get any more;" that there was considerable other conversation but not of any interest.

In our opinion the evidence does not show any real defense.

Counsel for the defendant maintain that although a contract may grant an agent the exclusive right to sell property, the owner nevertheless has the power to sell the property himself.

Granting this contention to be true, in view of the agreement by the defendant that he would pay the plaintiff a commission according to the rate established by the Chicago Real Estate Board, it is wholly immaterial whether a sale of the property was made by the plaintiff or by the defendant or by any other person acting for the defendant.

Counsel for the defendant further contend that the plaintiff did not make a sale nor procure a purchaser, and that therefore he is not entitled to recover a commission.

This contention is irrelevant and immaterial for the same reason that we have given as an answer to the first contention.

Counsel for the defendant further maintain that "Where an action is brought to recover earnings under an executed contract, no recovery can be had for damages for its breach."

The plaintiff's action is not for damages for a breach of contract, but for a specific amount alleged to be due him under the contract. The basis for computing the amount is provided by the terms of the contract itself.

It is further contended by counsel for the defendant that the amount fixed in the contract "cannot be construed to reflect actual damages sustained by the broker, but can only be considered to be a penalty, the payment of which is not countenanced by the courts.

The amount fixed by the contract as the commission for the plaintiff is not even remotely analogous to a penalty. As defined by the Cyclopedia of Law and Procedure:

> "A penalty is a sum of money which the law exacts the payment of, by way of punishment for doing some act which is prohibited, or the omitting to do some act which is required to be done. Strictly speaking, the term 'penalty' involves the idea of punishment, whether corporal or pecuniary, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The term includes also an equivalent by way of damages for a civil wrong, and is in this sense sometimes applied to stipulated damages for breach of private contracts wholly independent of statutes." 30 Cyc, pp. 1335, 1336, 1337.

Counsel for the defendant contend further that the plaintiff did not have a license from the City of Chicago as a real estate broker, and therefore, under section 391 of chapter XVI of the Municipal Code of Chicago, the plaintiff cannot recover a commission as a real estate broker.

The ordinance in question was not introduced in evidence, and the court cannot take judicial notice of its existence. <u>The People ex rel</u> v. <u>Russo</u>, 248 Ill., 11, 16, 17; <u>The People</u> v. <u>Heidelberg Garden Co</u>., 233 Ill., 296, 297.

It is further contended by counsel for the defendant

that the contract was not accepted by a member of the Sales Division of the Chicago Real Estate Board; that there is no evidence that there was a membership in the name of Snyder-Beckwith Company; that the evidence shows only a membership in the name of Thomas V. Beckwith.

The contract contains the following provision: "Void unless accepted by member Sales Division The Chicago Real Estate Board."

Pierce W. Jones, on behalf of the plaintiff, testified that he was the executive secretary of the Chicago Real Estate Board; that a copy of the contract between the plaintiff and the defendant was received by the Chicago Real Estate Board about August 2nd or 3rd, 1923; that mimeographed copies were mailed to 204 real estate offices in the city of Chicago about August 9, 1923; that on August 9, 1923, there were approximately 204 members of the Chicago Real Estate Board; that the purpose of listing the property is to obtain a proper field for the sale of real estate; that all members of Sales Division of the Chicago Real Estate Board pay a membership fee of $10; that in addition they pay the sum of one dollar for each listing they send to the Board; that the plaintiff was one of those members who paid that fee; that he, the witness, sent the contract to the 204 brokers in Chicago because the plaintiff was a member of the Sales Division and brought copies of the contract to him, the witness; that there is no membership in the Sales Division in the name of the Snyder-Beckwith Company.

In our opinion it is immaterial whether there was a membership in the Sales Division in the name of the Snyder-Beckwith Company. The defendant obtained the full benefit of having the property listed with the Sales Division. The purpose of the contract was accomplished. That this was effected by reason of the

fact that the membership in the Sales Division was in the name of the plaintiff, namely, Thomas V. Beckwith, and not in the name that he traded under, would not avoid the contract between the plaintiff and the defendant. The contract was substantially complied with.

Counsel for the defendant further contend that the finding of the court is contrary to the weight of the evidence.

We think the finding of the court is correct and that the judgment should be affirmed.

AFFIRMED.

McCurely, P. J., and Batchett, J., concur.

301 - 39399

43 Ill.

237 I.A. 637

CHARLES H. KAPLAN, Assignee of Central Trust Co. of Illinois, Trustee in Bankruptcy for John M. Tananewicz, Doing Business as Tananewicz Savings Bank, Bankrupt, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
PAUL NORKUS and ANNA NORKUS, Appellees.	

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Charles H. Kaplan, Assignee of the Central Trust Company, Trustee in Bankruptcy for John M. Tananewicz, doing business as Tananewicz Savings Bank, Bankrupt, from a judgment in the Municipal court of Chicago, in favor of the defendants, Paul Norkus and Anna Norkus, in an action on a promissory note executed by the defendants. A judgment by confession was entered on the note on August 7, 1917, against Paul and Anna Norkus, impleaded as Paul Markus and Anna Markus, in favor of the Central Trust Company, as trustee in bankruptcy for John M. Tananewicz, doing business as Tananewicz Savings Bank, for the sum of $252.36, which amount included the amount of the note, namely, $200, with interest at 7 per cent. August 8, 1917, an execution was issued against the defendants. August 21, 1917, on motion of the Central Trust Company, the record was amended by changing the names of the defendants from Paul Markus and Anna Markus to Paul Norkus and Anna Norkus. August 22, 1917, an execution was served on the defendants. September 1, 1917, the defendants filed schedules claiming the exemption of certain property from the execution. November 14, 1919, the judgment against the defendants was assigned by the Central Trust Company to Charles H. Kaplan, under an order of the United States District Court in the

bankruptcy proceedings. October 27, 1922, an alias execution was served on the defendants.

November 8, 1922, the defendants made a motion under Section 21 of the Municipal Court Act, chapter 37, to vacate the judgment. In support of the motion the defendants filed separate affidavits. The affidavits are substantially the same. The material averments of the affidavits are that the order changing the names of the defendants was entered without notice to the defendants and without any showing of any kind; that there appears in the records a certain schedule purporting to have been signed by the defendants; that it was represented to the defendants by a real estate man, to whom they went, that it would be necessary for them to sign papers to set aside the judgment; that the defendants were always under the belief that the judgment had been set aside; that the schedule, if signed by the defendants, was the paper heretofore referred to; that the first information the defendants had that there was a judgment against the defendants as Paul and Anna Borkus was upon being served with an alias execution; that the alias execution ran against Paul and Anna Borkus and was based upon a judgment rendered against Paul and Anna Barkus; that at one time the defendants borrowed $200 from John M. Tananewicz, doing business as the Tananewicz Savings Bank, for which they gave their note; that the note was fully paid; that the defendants were not indebted to Tananewicz in any amount whatsoever at the time Tananewicz was declared a bankrupt; that the defendants explained fully to the Central Trust Company, trustee in bankruptcy for Tananewicz, doing business as Tananewicz Savings Bank, that the indebtedness to Tananewicz was fully paid; that from September 1, 1917, up to the present time, the defendants had no knowledge or information of any kind that a judgment had been rendered against them on behalf of the Central Trust Company, as trustee in bankruptcy;

that the defendants have a full and complete defense to the cause of action; that they have not been guilty of laches; that immediately upon learning that the so-called judgment still existed, they took steps to have it set aside; that the defendants pray that the judgment may be opened up and set aside and that they may be given leave to plead to the merits in said cause.

The judgment was vacated and set aside and a trial was had on the merits. The trial was before the court without a jury. The court found in favor of the defendants.

The evidence sustained the allegations of the affidavits. Tamanewicz and the two defendants testified that the note had been paid, and their testimony was not contradicted. The note was not produced at the trial. The circumstances in which the note was paid, as testified to by these witnesses, were that after the note was executed Anna Borkus gave Tamanewicz an order for an insurance policy on a hat store she was conducting; that the store was burned at a loss of about $600 or $700; that after the fire the defendants called on Tamanewicz for the insurance; that Tamanewicz said he had forgotten to place the insurance, and that to cover his liability he would cancel the note.

Counsel for the plaintiff contend (1) that the affidavits do not conform to the requirements of section 21 of the Municipal Court Act; (2) that the allegations in the affidavits are mere conclusions of the pleader; (3) that no equitable grounds are stated which would justify the court in vacating the judgment; (4) that no defense on the merits is shown; (5) that the defendants have been guilty of laches; (6) that the finding of the court is against the evidence.

We do not agree with the contentions of counsel for the plaintiff.

It is true that section 21 provides that the grounds

for vacating a judgment after the expiration of 30 days shall be stated by a petition, but no objection was made by the plaintiff on the trial that the defendants proceeded by way of affidavits instead of by petition. In this state of the record it is immaterial whether the pleading was termed an affidavit or a petition provided the facts alleged came within the provisions of section 21.

We think that the material allegations in the affidavits are conclusions of fact, and conclusions of fact are equivalent to ultimate facts. Brown v. City of Aurora, 109 Ill., 165, 167; Caywood v. Farrell, 175 Ill., 480, 482; Laughlin v. Norton, 267 Ill. 476, 484. The general rule is that ultimate facts should be pleaded (21 R.C.L., section 3, p. 438) and not evidentiary facts. (Harding v. Marshall, 86 Ill., 219, 223; 21 R.C.L., section 3, p. 438.)

The facts stated in the petition in our opinion show a good defense and equitable grounds on which the judgment could be vacated.

We do not think that the defendants' right to have the judgment vacated is barred by laches. The essence of laches is not lapse of time. It is essential that there should be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy. Southern Pacific Co. v. Bogert, 250 U. S., 483, 488, 489. In the case of Carvell v. Kleha, 157 Ill., 462, the court stated that "a court of equity applies the doctrine of laches in denial of relief only where, from all the circumstances, to grant the relief to which the complainant would otherwise be entitled, will, presumptively be unequitable and unjust, because of the delay."

We do not think that the finding of the court is manifestly against the weight of the evidence. Counsel for the plaintiff attack the credibility of Tamunewicz, and discuss the improbability of the testimony in regard to the circumstances in which the note

was paid. The testimony on behalf of the defendants was not contradicted and there is nothing inherently improbable in the testimony concerning the manner in which the note was paid. The finding of a court in a trial without a jury is entitled to the same presumptions as the verdict of a jury. Fink v. Henning, 168 Ill. 105, 108. The rule is a familar one that it is the special province of the jury to determine the credibility of the witnesses, and the probability or improbability of their testimony; and that a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale Elevator Co. v. Hale, 201 Ill., 131, 146.

We are of the opinion that the judgment should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

36 - 29439

SAMUEL F. LUZZO,
Appellee,

vs.

SECURITY TRUST & DEPOSIT COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

237 I.A. 637

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit brought by the plaintiff, Samuel F. Luzzo, against the defendant, the Security Trust & Deposit Company, to recover the value of certain property deposited in a safety deposit box rented from the defendant.

The case was tried before a jury. The defendant offered no defense. Only one witness testified on behalf of the defendant, and the only purpose of his testimony was to account for the absence of W. F. Dickinson, the vice-president of the defendant. The court instructed the jury to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of $3302.50. The jury returned a verdict in accordance with the instruction. From the judgment on the verdict the defendant prosecuted this appeal.

The only question in the case is whether the evidence justified the court in instructing the jury to find the issues for the plaintiff.

The plaintiff testified that he rented a safety deposit box from the defendant for the term of one year from January 4, 1921, to January 4, 1922; that he paid the annual rental, which was $8; that the defendant was located at the northeast corner of Randolph street and State street, in Chicago; that the company had vaults for the night and that he was a night tenant; that he saw his box about eleven o'clock Saturday morning on August 13th; that at this time the box contained two $2.50 gold pieces; $1000

in war savings stamps; $7000 in Liberty bonds, 3rd, 4th and 5th series; $3400 in currency; a couple of mortgages; a lot of receipts relating to the business of the Liquid Carbonic Company, of which he was secretary and treasurer; that on Monday morning August 29, 1921, he heard that the Safety Deposit vaults of the defendant had been robbed; that he went at once to his safety deposit box; that he saw a man there that he had never seen before; that the plaintiff inquired about Dickinson; that he saw Dickinson; that Dickinson said, "Sam, what did you have in there?" that he, the plaintiff, told him he had two $2.50 gold pieces; $7000 in Liberty bonds; $1000 in war savings stamps; that Dickinson said, "I think your box is safe. What else did you have?" that he, plaintiff, said that he had $2300 in currency; that Dickinson asked him how the money was wrapped up; that he, the plaintiff, told him that the money was folded up in $100 bills and had a rubber band around it; that Dickinson tapped him on the shoulder and said, "Your money and bonds are safe;" that he, the plaintiff, said, "How about getting it now?" that Dickinson said, "You will have to wait a little while;" that he, plaintiff, stood around awhile and Lieutenant Norton came down and Dickinson said, "You better see Lieutenant Norton;" that he, plaintiff, described everything to Lieutenant Norton the same as he had to Dickinson; that "his stenographer put everything down;" that Dickinson "assured us everything was all right;" that his wife was with him when he saw Dickinson and Lieutenant Norton; that "we were told to come back in the afternoon;" that at that time Lieutenant Norton was late; that Lieutenant Norton called him first; that he, plaintiff, went to where all of the boxes were piled inside of an apartment by itself; that the manager, Allanby, was there taking items of what they found and what they didn't; that

Allenby said, "What number did you have?" that he, plaintiff, said "608;" that Allenby directed one of the officers to go to 608; that the officer came in and said there was nothing there; that he, plaintiff said, "I was told that my money, bonds and everything were safe;" that Lieutenant Barton said, "What do you mean? Who has been telling you this?" that he, plaintiff, said, "Why, Mr. Dickinson;" that he, plaintiff, said he would go out and get Dickinson; that he brought Dickinson back and said to Dickinson, "Didn't you tell me that my money, the bonds and everything else was here this morning?" that Dickinson said, "Yes;" that he, plaintiff, said to Dickinson, "Didn't you tell me you counted that money twice?" that Dickinson said, "Yes;" that he, plaintiff, said, "Where is it now?" that Dickinson said, "I can't tell you, I don't know where it is now. This is a shell game. Let us see the list. Probably you might find some of your losses in some of these boxes;" that he, plaintiff, stayed there until they got through; that in the meantime there was a pile of rubbish - "we found - the police officer was standing near me, - we found the $1,[illegible] in our savings stamps with my name on the envelope that I had bought from the Metropolitan Life Insurance Company; that we found one two and a half dollar gold piece; some of my receipts and some of my private papers;" that he then went out and told Dickinson that he would see him the following day; that he saw Dickinson the following day and asked him for his money and bonds; that he, the plaintiff, said, "It is very funny you counted it;" that Dickinson said, "It is very funny how it disappeared. Nevertheless, the insurance will cover all that up. You will not lose your money;" that he, plaintiff, saw Dickinson nearly every day in September; that Dickinson gave him $1000 on September 17th; that a couple of days

before Dickinson told him to come on, about a month after the robbery; he said he had found the $2300 but that he couldn't tell who it belonged to; that he, plaintiff, said, "Has anybody ever described it to you, the denominations of that money like I have?" that he said, "The money is yours but I can't give it to you;" that he, plaintiff, said, "Why can't you give it?" that Dickinson said, "Well, I might get in trouble;" that he, plaintiff, said, "How will you get in trouble when you admit the money is mine?" that Dickinson said, "I admit Walter Corn is trying to claim it, but I cannot give it to you;" that on September 12th Dickinson said, "I will tell you what I will do, Sam. If you will give me a receipt for $2000 I will give you $1000;" that plaintiff said, "Why give you a receipt for $2000 when you are giving me $1000?" that Dickinson said, "I have got to protect myself. If it comes to a show down I can show the receipt that the $2000 has been paid;" that he, plaintiff, said, "Why don't you give me $2000 if you want a receipt for $2000?" that Dickinson said, "No, I can't do that;" that he, plaintiff, said, "All right, I will go over and see my attorney;" that he went to see his attorney, Mr. Fell; that Mr. Fell and he went back to see Dickinson; that Mr. Fell asked Dickinson why he wanted a receipt for $2000; that Dickinson said he wanted the receipt for his protection; that Dickinson said, "I will give you $1000, and promise you that I will give you the other $1000 in 30 days;" that Mr. Fell argued with Dickinson and asked him why he didn't give plaintiff the money; that Dickinson said to Mr. Fell, "I cannot. I will promise you faithfully I will give him the other $1000 in 30 days;" that he, the plaintiff, never got the other thousand; that when he got the one thousand he gave a receipt for it; that he never got any other money; that he still has $8302.50 coming in bonds and money, which he has demanded from defendant.

John Ryan testified on behalf of the plaintiff that he sold the plaintiff Liberty bonds to the amount of $350; that he, Ryan, bought the bonds from the Liquid Carbonic Company.

John Albert Ellison testified on behalf of the plaintiff that on December 12, 1918, he sold the plaintiff Liberty bonds to the amount of $6,600.

Milton Jones, a night guard for the defendant, testified on behalf of the plaintiff that the vaults of the defendant were robbed about eight o'clock on August 28, 1921; that he and the night superintendent, Emmes Webber, were the only employees of the defendant at work that night; that a guard who usually worked until ten o'clock at night was not there; that four men came in, said they wanted to rent a box; that they came to the gate where he, the witness, was stationed; that they had an O. K. from Webber; that he, the witness, opened the gate for the men; that they held a gun on him and tied him to a water pipe; that Webber came tearing in and hollered the place had been robbed.

Emmes Webber, the night superintendent, testified on behalf of the plaintiff that he rented the boxes to the men and endorsed their tickets; that he had never seen the men before that night; that they looked all right; that he saw nothing suspicious about them; that he knew a robbery was taking place in the vaults; that they came out and tied him up.

The grounds on which the defendant asks for a reversal of the judgment are that the plaintiff has not shown by a preponderance of the evidence "that securities of the value of $3302.50 were deposited in that box and lost," or "that they were lost through the lack of ordinary care and diligence on the part of the defendant."

Counsel for the defendant contend that "there was no evidence introduced to sustain the first of these propositions, except the unsupported statement of the plaintiff that from time to time he had deposited these securities in the box and that after the robbery, which took place on August 28th, the securities were gone;" that "such a statement by a party in his own interest, of a fact within his own exclusive knowledge, which the defendant has no means or opportunity to controvert, may or may not be sufficient;" that "the jury is the exclusive judge of that question."

Counsel for the defendant have overlooked one important fact in the testimony of the plaintiff, and that is that he told Dickinson the contents of the box and that Dickinson said, "Your money and bonds are safe," and admitted that the "money, the bonds and everything else" were there. If this testimony of the plaintiff was untrue, Dickinson should have been produced as a witness by the defendant to contradict the plaintiff. Dickinson's absence was accounted for by his illness; but no motion was made by the defendant for a continuance of the trial because of the illness of Dickinson.

The testimony of the plaintiff was uncontradicted and was not inherently improbable. In this state of the record there was no issue to submit to the jury on the question whether the money and bonds were deposited in the box by the plaintiff.

In regard to the second contention of counsel for the defendant, the question whether the defendant exercised ordinary care and diligence as bailee is not involved, in view of the testimony of the plaintiff that although Dickinson told the plaintiff that his money and bonds were safe, admitted that he, Dickinson, counted the money and that the "money, the bonds and everything else" were there, yet Dickinson refused to deliver

the property to the plaintiff on the plaintiff's demand. On this testimony, which is uncontradicted, the defendant was guilty of conversion, as a matter of law.

The general rule is that a question becomes one of law and not of fact when the facts are not in dispute and all reasonable men will agree on the legitimate conclusions to be drawn from the facts. Sturm v. Consolidated Coal Co., 246 Ill. 20, 28.

In this connection it should be stated that the plaintiff did not base his action entirely on the ground of negligence on the part of the defendant. The declaration contained the common counts; and the affidavit of merits stated that "the demand of the plaintiff for thirteen hundred dollars in currency, one two and a half dollar gold piece, seven thousand dollars of United States Liberty bonds deposited in the safety deposit box of the defendant and which the defendant failed to return to the plaintiff, and that there is due to the plaintiff eight thousand three hundred two and 50/100 dollars."

We are of the opinion that the trial court did not commit error in instructing the jury to find the issues for the plaintiff.

In the case of Union Surety Co. v. Tenny, 200 Ill. 349, in which an instruction was given directing the jury to find the issues for the plaintiffs, the court said (p. 354)

> "The evidence for appellees was all documentary, and there could be but one construction of it, and that was the construction that the court put upon it by the giving of the peremptory instruction to find for the plaintiffs. There was no evidence tending to support any defense, and we find no error in the giving of this instruction."

In the case of Franklin Park v. Franklin, 231 Ill. 380, in which the court directed the jury to return a verdict in favor of the plaintiff, the court said (p. 383):

"There was ** no proof before the jury, other than the formal proofs offered by the appellee, which made a prima facie case in favor of appellee and entitled it to judgment. The court did not, therefore, err in instructing the jury to return a verdict in favor of appellee."

To the same effect is the case of Sweeney v. Life Association of America, 152 Ill. App. 173, 179.

The judgment is affirmed.

AFFIRMED.

McBurney, P. J., and Matchett, J., concur.

106 - 20515

437 Ba

C. C. STEVENS,
Appellant,

vs.

LAVINIA McCONNELL DONALDSON
and PERCY DONALDSON,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 638

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant, C. C. Stevens, from a decree dismissing a suit brought by the complainant to foreclose a mortgage against the defendants. The defense to the suit is the Statute of Limitations.

The material facts are not in dispute. The complainant is the holder of a note for $5,500 executed on November 4, 1901, by Edward P. McConnell and his wife, Lilian W. McConnell. The note was made payable five years after date to the order of Edward P. McConnell and Lilian W. McConnell, and was endorsed by them in blank. James S. McConnell, sometimes referred to as J. S. McConnell, the father of Edward P. McConnell, wrote on the back of the note the following endorsement: "I hereby guaranty payment of the within note. J. S. McConnell." To secure the note a trust deed was executed on the same date as the note by Edward P. McConnell and Lilian W. McConnell, conveying to Nils A. Nelson the property now sought to be foreclosed, which property was then owned by Edward P. McConnell and Lilian W. McConnell. The trust deed expressly referred to the note. The trust deed and note were delivered to Nelson and Nelson paid the $5,500, the amount of the note, to James S. McConnell. The money was furnished by Amos Churchill. According to the testimony of John B. Mesny, who negotiated the loan, James S. McConnell "had to guarantee the paper, or the loan would not have gone through." Mesny further testified, and his testimony is not contradicted, that James S.

McConnell asked Keamy to negotiate the loan for Edward P. McConnell the son of James S. McConnell; that the son had title to the property at the time, and that for some reason he, Keamy, did not dincuss that with James S. McConnell. Five days after the deed of trust was executed, namely, November 9, 1901, Edward P. McConnell and his wife, Lilian W. McConnell, conveyed the property to Lavinia P. McConnell, the wife of James S. McConnell and the mother of Edward P. McConnell. The deed was not recorded until May 16, 1906. The deed expressly provided that the conveyance was made subject to the trust deed. During the time that Edward P. McConnell was the owner of the property he made no payments on the note of either interest or principal. On August 9, 1907, Lavinia P. McConnell conveyed the property as a gift to their daughter, Lavinia Pike McConnell, now Lavinia McConnell Donaldson, one of the defendants in the case at bar. This deed was not recorded until April 27, 1916. The McConnell family lived on the premises for years. After the property was conveyed to Lavinia McConnell Donaldson no rent was paid to her, nor was any rent ever paid to Edward P. or Lilian W. McConnell while the property was in their names. Lavinia McConnell Donaldson never paid any of the interest or principal on the note. All of the payments of interest and principal were made by James S. McConnell. The payments were as follows: On March 23, 1911, $2,000; on November 4, 1913, $500; on October 6, 1916, $500; on May 4, 1912, $104 was paid as interest. Payments of interest were made up to May 4, 1920. Lilian W. McConnell died in 1915. On June 21, 1922, James S. McConnell died. He was living on the premises in question at the time of his death. Amos Churchill was the first holder of the note. He died in 1910 and his wife, Nahala Churchill, acquired the note. In January, 1922, O. C. Stevens, the complainant, became the holder of the note. While Nahala Churchill was the holder of the note she received the following letter from James S. McConnell:

"My dear Madam:

Your line just at hand and this day received. In reply hasten to say that if you can help me a little and cut down your interest due next month (in May) I will trim off some things and accounts, so I can help you also, to-wit: in a few short words - knock off (my May) 1930 payment of int. and then I can and will then mail to you in 'Chicago Exchange' or 'New York Bft.' a payment on the old note, that you now hold - I will and can remit to you then $500.00 (Five Hundred Dollars) - money is slow here and times are not easy - please give me 75.00 for 'my stat.' or int. I am again most truly and sincerely.

James S. McConnel (Signed)

P. S. - During the past six months we have had a good deal of illness in my family - My daughter, Mrs. Donaldson has now five (5) handsome babies - a sweet little daughter and four nice tall bright boys - handsome like their grandfather, all of them - help us."

Lavinia McConnell Donaldson, one of the defendants, testified that she never made any payments of interest or principal on the note; and that she never had "any dealings about it;" that her husband, Percy Donaldson, one of the defendants, never made any payments of interest or principal on the note that she knows of; that when she received the deed to the property from her mother, she kept the deed in her possession most of the time and then "let it lay around carelessly;" that her father, James S. McConnell, said that "the property should belong to the wife, and then he said he was glad to have his daughter have it because he thought a boy could earn a living better than a girl could, and the girl ought to have the property;" that she knew nothing about a master's deed being given; that she heard "them talk back and forth about things," but that she "never paid any attention to know about anything."

Percy Donaldson testified that he never made any payments of principal or interest on the note and never authorized any one to make such payments; that James S. McConnell paid the taxes "mostly." In regard to the question, "Did you know anything about the existence of the mortgage at any time?" he testified as follows: "I didn't until I made an examination over at the court house, when the matter was taken up with Mr. McConnell, and his

heart was troubling, he was rather in bad shape, and he seemed to be feeling badly and these people were going to prosecute, and I wanted to inform myself, and I went to the City Hall to look over the record. That was the first knowledge I had." He also testified that he did not think that his wife knew anything about the mortgage. In answer to the following, "Wasn't Mr. McConnell, just prior to his death, trying to make a new loan on the property so as to take up the mortgage?" he answered as follows: "It was his thought that my wife, Lavinia, would help him out of this situation and I think she would have done it. I went to the office of the attorney in question and told him that he was an old man, and his heart was troubling him, and that any such shock might hurt him, and that I was willing to help him in any way or shape that I could, and I made the gentlemen over at the office an offer, tentative offer, to be considered, which I would recommend to Mrs. Donaldson, to this effect: that if they would not worry him with it, and would induce their people to put a mortgage on the property that was a genuine mortgage, my wife would consent to it and help the father to this extent, and they turned the offer down and would not do it, and I warned them that it was a hurtful thing to do this thing to him. As a matter of fact, when the notice was served, he died within one hour of apoplexy. They handed him the notice; when he came in the door he started on to the dinner table and within an hour - at least he was shocked within an hour, and died during the night. I am not a physician. I don't know whether my wife was agreeable to taking up the mortgage in that way. I did not come down to represent her. I talked to her about it." In answer to the question, "Was your wife agreeable to taking up the mortgage in that way?" he answered, "I don't know."

The Master found that the equities were with the complainant and that the complainant was entitled to a decree of foreclosure and sale.

On the hearing before the Chancellor on the exceptions to the Master's report, the Chancellor sustained the exceptions and dismissed the bill for want of equity. The Chancellor found as follows:

> "That suit to foreclose the deed of trust was not begun within ten years after the right of action accrued, and that payments made by the guarantor on the principal note, who was not the owner of the premises at or subsequent to the date of the trust deed, did not toll the Statute of Limitations; and that the evidence of knowledge, acquiescence and ratification by the owner of the premises to such payments by the guarantor is not sufficient to prevent the running of the Statute of Limitations."

We are of the opinion that the Master correctly found in favor of the complainant, and that the decree of the Chancellor is erroneous.

The question whether the payments made by James H. McConnell, if considered as being made by him merely as guarantor of the note, would stop the running of the Statute of Limitations against the defendants, is argued at length by both counsel for the complainant and counsel for the defendants. In the view we take of the case it is not necessary to decide that question of law. We are clearly of the opinion that as a question of fact the payments made by James H. McConnell were made with the knowledge and acquiescence of the defendants. Consequently the running of the Statute of Limitations was arrested as to the defendants. The principle on which this conclusion is based is expressed in the rule that where payments are made from time to time by one joint debtor, with the knowledge, consent or ratification of the other, the running of the Statute of Limitations is arrested as to both joint debtors. Granville v. Young, 85 Ill. App. 167, 169; McDonald v. Waidner, 103 Ill. App. 390,392;

Adams v. Douglas, 123 Ill. App. 319, 321.

From the evidence, although it is circumstantial, the conclusion is irresistible that the defendants knew of and acquiesced in the payments made by James S. McConnell. When the note and trust deed were executed to secure the loan, the money was paid to James S. McConnell. At that time Edward P. McConnell held the title, but five days after the execution of the note he conveyed the property to his mother, Lillian W. McConnell, who subsequently conveyed it as a gift to her daughter, Lavinia McConnell Donaldson, one of the defendants. As we have stated, the McConnell family lived on the premises.

We agree with the opinion expressed by the Master that, "It is incredible that, living for years on these premises with her father, James S. McConnell, and having notice of the existence of said trust deed, which was unreleased of record, the defendant, Lavinia McConnell Donaldson, did not know of and acquiesce in the aforesaid payments of principal and interest by him." Furthermore, it is not reasonably possible to reconcile the facts with the theory that James S. McConnell was making the payments merely as guarantor on the note. The facts lead to the inference that he was the equitable owner of the property. But without deciding that question, we are of the opinion that he was making the payments not primarily as guarantor on the note, but as one who was interested in saving the home of his family from foreclosure. The tragic circumstances of his death, as related by his son-in-law, Percy Donaldson, one of the defendants, conclusively show that James S. McConnell, after struggling for years to save the family home from foreclosure, could not, in his old age, survive the shock when he found that his efforts had been in vain. His pathetic note to Mahala Churchill, in which he pleads for a further extension of time for payment "on the old note,"

not on the guaranty of the note, clearly indicates that he, as head of the family, was thinking only of the welfare of his family, and not of himself alone, as guarantor on the note. In the postscript, after referring to the defendant Lavinia McConnell Donaldson and her children, he says "help us." James S. McConnell was the only person that the holders of the note ever knew in connection with the transaction. They treated him liberally and generously, and the members of his family, as well as himself, were the beneficiaries of this liberality and generosity. It would be inequitable in the circumstances to allow the defendants to use the Statute of Limitations for the purpose of working injustice.

We adopt the finding of the Master that the complainant "had a first and paramount lien upon said premises for said sum of $3211.25, together with interest on the sum of $2911.25 thereof at the rate of five per cent per annum from September 19, 1923, the date of this report, and is entitled to be first paid said sum of $3211.25 and such interest out of the proceeds of any sale on foreclosure of said premises."

The decree of the Chancellor is reversed and the cause remanded with directions to the Chancellor to enter a decree of foreclosure and sale in accordance with the views expressed in this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

McDurely, P. J., and Matchett, J., concur.

116 - 29525

BREMER MANUFACTURING CO., a corporation, for the use of VERONICA MALTHY, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
J. C. TULLY, (Garnishee), Appellant.	

237 I.A. 638

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by J. C. Tully, garnishee, from a judgment in the Municipal Court of Chicago against him in garnishment proceedings begun by Mrs. Veronica Malthy. A judgment was obtained against the Bremer Manufacturing Company by Mrs. Malthy.

Tully was summoned as garnishee, together with M. A. Bremer and M. C. Rasmussen. On the trial Bremer and Rasmussen were discharged, and judgment was entered against Tully in the sum of $363.30.

There are several questions of law discussed in the briefs of both counsel, but in view of the fact that we are of the opinion that there is no evidence showing that Tully was indebted to the Bremer Manufacturing Company, it will not be necessary to consider these questions.

The only evidence in the record in regard to Tully's alleged indebtedness is the testimony of Tully, which appears in the bill of exceptions. The report of his testimony is set out in the bill of exceptions as follows: "J. C. Tully appeared in court as plaintiff's witness and testified that he had bought some property from M. C. Rasmussen and that he had no property of the Bremer Manufacturing Company either then or at the time of the summons in garnishment. And there was no further evidence or testimony in the case."

Counsel for Mrs. Maltby maintain that "on appeal from the Municipal Court of Chicago in the absence of a stenographic report it will be presumed that the evidence was sufficient to support the finding and judgment."

The implication of the contention of counsel is that the document in the case at bar cannot be considered as containing all of the evidence. The document is entitled "Statement of Facts and Bill of Exceptions;" and at the conclusion of the document the following certificate appears:

> "FORASMUCH as the foregoing matters do not otherwise appear of record, the defendant tenders the foregoing to the presiding Judge of said Municipal Court and requests said Judge to sign and place the same on file in the foregoing case. It is therefore hereby certified by the undersigned, Judge of The Municipal Court of Chicago, that the foregoing is a correct statement of facts appearing upon the trial of the foregoing case and of all questions of law involved in said case and the decisions of the Court upon all such questions of law."

It has been held that the rules of construction which apply to bills of exception are applicable by analogy to statements or reports of the evidence in the Municipal Court. Seehausen, Mahrs & Co. v. Interstate S. & L. Co., 150 Ill. App. 179, 186.

The rule in regard to bills of exceptions is that the bill of exceptions need not recite that it contains all of the evidence, if it reasonably appears that such is the case. Marine Bank of Chicago v. Bushnell et al., 38 Ill. 463, 469,470; Harris v. Miner, 28 Ill. 135, 138; Mullin v. Johnson, 93 Ill. App. 621, 622. 623; Fisher v. Chicago City Ry. Co., 114 Ill. App. 217, 221; Marshall v. Ford, 124 Ill. App. 284, 287.

We are of the opinion that the document should be considered as a bill of exceptions, and as containing all of the evidence. The certificate does not in terms state that the bill of exceptions contains all of the evidence but we think

that the language used in the certificate may be considered as equivalent to saying that the bill of exceptions contains all of the evidence.

Counsel for Mrs. Malthy cite authorities which they maintain support their contention that the bill of exceptions in the case at bar does not purport to contain all of the evidence. We do not think that the authorities are in point. In those cases the recitals in regard to the statements or reports of the evidence are materially different from the recitals in the case at bar. The only Supreme Court case cited by counsel is the case of Starks v. National Monthly Co., 273 Ill. 326. In that case the court stated expressly that the trial judge did not certify that the statement contained all of the evidence. The certificate of the trial judge is not set out in the opinion.

In the case at bar we have expressed the opinion that the certificate of the trial judge was equivalent to the statement that the bill of exceptions contained all of the evidence.

Counsel for Mrs. Malthy state that they "call particular attention to the fact that the so-called statement of facts or bill of exceptions is not O.K'd, does not bear the approval of appellee's attorneys, and can in no sense be considered as an agreed statement of facts."

It is true that the bill of exceptions is not O.K'd by counsel for Mrs. Malthy, but the following stipulation was entered into by the parties:

> "It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that the original Bill of Exceptions in this case may be used in lieu of a copy thereof on the appeal of this case to the Appellate and Supreme Court of this State."

We think that in view of this stipulation counsel for Mrs. Malthy cannot now raise the question of the correctness of the bill of exceptions.

In the case of Northwest Park District v. Radenberg, 267 Ill. 590, in considering an objection to a bill of exceptions, after stating that the bill of exceptions was O.K'd, the court added (p. 590):

> "Besides, counsel also signed a stipulation that the original bill of exceptions signed by Judge Plain should be incorporated into the record instead of a copy. This being so, the conclusion is inevitable that counsel agreed that Judge Plain should sign this bill of exceptions and that it is correct, and they cannot now raise this question."

We think that the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

McNurely, P. J., and Ratchett, J., concur.

44 - 29447

MARY JOHNSON, HERBERT ERIC JOHNSON and GERTRUDE JOHNSON, (Minors), by MARY JOHNSON, Their Next Friend,
Defendants in Error,

vs.

HENRI FYPE, MARY KELLY and MARY JANE CARROLL,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

237 I.A. 638

MR. JUSTICE MACHOSETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs, the widow and minor children of Alexander Johnson, brought suit alleging that on November 22, 1917, Henri Fype sold and gave to said Johnson intoxicating liquors which caused his intoxication in whole or in part on account of which he died. Plaintiffs in error, Mary Kelly and Mary Jane Carroll, were joined as defendants, it being alleged as to them that they were the owners of the building in which, with their knowledge and consent, Fype sold intoxicating liquors. The action was brought under the Dram Shop act. There was a verdict and judgment for $12,500.

The principal contention of the defendants is that, assuming all the evidence for plaintiffs to be true, it was wholly insufficient to warrant a judgment.

Before taking up this vital contention we will consider other points which are earnestly urged. The deposition of one Herman Larsen was read in evidence over the objection of defendants, and without doubt it contributed to the verdict which was returned. The defendants urge this deposition should not have been admitted because it was not returned as required by the Statute and because, as it is said, the evidence of Larsen failed in the identification of Johnson as the person concerning whom the deposition was taken.

The deposition was taken by stipulation on March 28, 1921, and defendants contend that it was not returned to the clerk

of the court and was not filed in court until November 21, 1922, nearly eighteen months afterward. Whether the deposition was in fact returned to the clerk does not appear from the record. The presumption is that it was so returned. The attorney for the defendants stated upon the trial that "the deposition was filed by the plaintiff during the course of the last trial without leave of court, and it was objected to by the defendants and counsel for the plaintiff had known of our objection." It thus clearly appears from the record that defendants had notice that the deposition was on file, notwithstanding they failed to make any motion to suppress the same until after the jury had been sworn to try the issues.

This case is clearly distinguishable from L. N. A. & C. Ry. Co. v. Heilgrin, 93 Ill. App. 402, upon which the defendants rely, in that there the deposition to which objection was made had not been filed at all, and, as the court said, a motion to suppress would have been inapt for the reason that there was nothing returned to the court or in the files to which such a motion would have been applicable. Without discussing the cases at length, we think Thomas v. Dunaway, 5[illegible] Ill. 372; Gorman v. Anderson, 3[illegible] Ill. 95; Winslow v. Newlan, 45 Ill. 148; In re Will of John Noble, deceased, 124 Ill., 266; Hodges Fiber Carpet Co. v. Bugg Carpet Co., 203 Ill. App. 484, and many other cases that might be cited, are conclusive that the court did not err in denying defendants' motion.

As to the further objection that the deposition did not identify Alexander Johnson as the person about whom the testimony was given, we think it is sufficient to say that, if it is granted that he was not so identified in the testimony of Larsen there was other evidence in the record from which the identification could very properly be inferred.

A further contention of the defendants is that the court erred in giving certain instructions. The first instruction given at the request of the plaintiff was in the language of section 9 of the Dram Shop Act, with the exception that the last 10½ lines of the Act, which clearly were inapplicable to the case, were omitted. The defendants say that the principal vice of the instruction is that it sets forth a part of the section of the Statute which was not applicable, the particular complaint being that the phrase, "injured in person or property," as it appears in the Statute, was inserted in the instruction, while, as a matter of fact, there was no claim that the plaintiffs had been injured either in person or property. The defendants say that the instruction would intimate to the jury that they were authorized to assess damages for loss of increase of the deceased's estate (which they might assume would have increased had he not died) or for mental suffering, loss of companionship, etc.

The defendants concede that the Supreme Court has held that instructions in the language of the Statute may be given (Vetrovec v. Meyers, 158 Ill. App. 392, Reisch v. The People, 229 Ill. 574) but they contend that those cases are distinguishable, and further, that the instruction is erroneous under the authority of Hennessy v. Huffman, 184 Ill. App. 351, where it was held that the giving of an abstract instruction such as this might mislead the jury in the absence of an instruction limiting the damages which might be recovered to the loss of plaintiff's means of support, or informing the jury what was the proper measure of damages.

The declaration did not claim damages to the means of support, and it does not appear any evidence was offered tending to show injury to the person or property of the plain-

tiffs except as to their means of support. Moreover, there were otherinstructions with reference to damages in which the jury was properly instructed on this point. Instructions must be considered as a series, and we cannot bring ourselves to believe that an intelligent jury would allow damages not claimed, concerning which there was no proof, and which were, by plain inference, excluded in several instructions given.

Defendants cite Baker v. Reddick, 231 Ill. 52, a case which is, however, clearly distinguishable, where the judgment was reversed on account of an instruction which practically directed a verdict for the full amount of damages claimed in the declaration.

Again the defendants say that the first instruction was erroneous because it stated that the Statute in question gave to plaintiffs a right to recover "exemplary damages." If this instruction stood unconnected with other instructions of the series, there might be some merit to this contention. In view of the fact that particularly in plaintiff's instruction No. 5, the jury were given proper directions as to the circumstances under which exemplary damages might be allowed, we do not think there was error in this respect.

The defendants insist that there was no evidence in the case which would justify the allowance of exemplary damages. We shall hereafter discuss the evidence, but for the present it must suffice to say that in the view we take of the case, there is abundant evidence from which the jury might well have inferred that the wrong of the defendants was wanton and wilful and the circumstances so aggravating as to justify the infliction of smart money.

The defendants further contend that the court erred in instructions Nos. 2 and 4, by which the jury were in substance

told that if they should find for the plaintiffs, then in estimating the damages, if any, they might take into consideration not only the wages and earnings of the deceased for any given period, as shown by the evidence, so far as they might believe from the evidence that such wages and earnings furnished a means of support for the plaintiffs, but also the probable length of life of the deceased till terminated by natural causes, if and so far as it might be shown by the evidence, had he not died on November 23, 1917; and that they might take this estimate into consideration together with all the other facts and circumstances shown in the evidence.

Counsel conceded these instructions were approved in Betting v. Robbett, 142 Ill., 72, but say the case there is distinguishable from this one in that the death was occasioned by external violence, and that there was no question about that fact. The real question at issue, however, in that case was - as it is here - whether the sale of intoxicating liquors in whole or in part contributed to the death.

The fact that the immediate and direct cause of death was external violence is not material or controlling. The instructions are also criticised as assuming that Johnson did not die a natural death, which was one of the disputed questions of fact in the case. The instructions criticised, however, were limited to the question of damages, and the jury was instructed in case they should find for the defendants, there would be no occasion to consider the question of damages. We cannot concede that an intelligent jury would be thus misled. We do not think these instructions were erroneous. Dawley v. Hibbard, 229 Ill. 86; O'Fallon Coal Co. v. Lagnet, 198 Ill. 185; Gruenaere v. Filby, 276 Ill. 324.

Plaintiffs' instruction No. 6 is also complained of on the ground that it assumes the disputed facts as to whether the deceased was intoxicated on the night prior to his death, and also as to whether he was in defendant Pype's saloon on the evening in question.

In regard to this criticism we think it may be said that the evidence tends to show without dispute that the deceased was intoxicated on the evening of November 22nd. The witnesses for defendants, it will be noted, denied that they saw Johnson on that evening. Assuming their own evidence to be correct, they could not know of his condition.

The coroner's physician, Dr. Springer, testified that he found no evidence of alcohol, but further stated that if deceased had been intoxicated the night before, there would have been no evidence of it in his stomach four hours later. Instructions given at the request of the defendants are subject to the same criticisms, which would seem to preclude this complaint. We do not think there was any serious error in the instructions.

We now pass to the point in regard to the lack of evidence of causal relationship between Johnson's supposed intoxication and his subsequent death, the point, we think, upon which the defendants rely.

The facts which were either undisputed or which, being disputed, the jury might have believed to be true, were as follows:

On November 22, 1917, the defendant Henri Pype, kept a saloon at No. 5491 Lake Park avenue in the City of Chicago. He had conducted this business at that place for thirty years and, with his family which consisted of his wife, a son and two daughters, lived over the saloon. The other defendants, Mary Kelly and Mary Jane Carroll, were the owners of the premises upon which the saloon was conducted, and Henri Pype paid rent to

them, they calling to collect it.

The property was adjacent to the wall of the Illinois Central Railroad Company. The wall was about three or four feet high and the embankment sloped up to the tracks, which were being raised at this time. The building was about thirty feet wide and there was a space of about six or seven feet between the rear of the building and the wall. The south side of this space was fenced with a fence four or five feet high, and on the north side of it there was a building extending to the railroad. There was no saloon sign on the rear of the building. The steps of the stairway leading to the second floor went up a few steps to a landing which was about even with the top of the Illinois Central wall, and there was a railing on the landing about two and one-half of three feet high.

At this time the deceased, Alexander Johnson, lived with his family at 6301 Blackstone avenue, which was about a mile and a half from the saloon. He had been working steadily on a railroad at 47th and Morgan streets, and prior to that time had worked in the shipyards in South Chicago. He always brought his wages home to his wife, and while working at the shipyards he earned $45 a week. She testifies that he was a healthy man, had not been sick in five years, and weighed about 155 pounds, was 51 or 52 years old; that they were married in 1890 and she lived with him as his wife until he died; that two children, a son and a daughter, sixteen and twelve years of age respectively at the time of the trial, lived with them. Her evidence indicates that he was accustomed to indulge in intoxicants to some extent. She says, "Not more than any one else, not frequently." On Saturday nights he would go out and take a few drinks, but he was not intoxicated to an extent which would make him unable to take care

of himself. He had not required the services of a doctor for years. Sometimes on Saturday evenings his wife would go out with him, but she had never been to Pype's saloon, although she says, "I always went with him to Lavina." He was not in the habit of staying out at night.

On the morning of November 22, 1917, Mrs. Johnson prepared his breakfast, and he told her he might not work that day, as it was raining. She gave him thirty cents that morning, and this was the last time that she saw him alive. He wore a dark working suit, a dark cap, a dark brown overcoat and under the coat a dark read sweater.

On the following day she was notified of his death by the police. About eight o'clock on the morning of the 23rd some one in Pype's saloon notified the police that a man was dead there, and the body was by the police removed to the undertakers, where it was identified as that of Alexander Johnson.

Pype's daughter, known as "Babe," told the officers who investigated that on this morning, when she and one McKenna were in the saloon, there was a rap at the rear door; that they opened the door and that Johnson came in and sat by the fire; that he was cold; that they gave him a drink of whiskey, and that shortly after he keeled over and fell to the floor; that they tried to get him up and it seemed as though he was dead. The officers asked if they knew the man and the reply was, "No." Henri Pype, Smith, McKenna and "Babe" were present at this conversation.

The night of November 22, 1917, was chilly and some snow fell. One of the officers who went to the saloon on the morning of the 23rd testified that there were footprints in the snow around the rear door, and that he could not see any foot-

prints on the stairway. Officer Reilly, who was present in the Municipal court, says that the defendant Pype there testified that Johnson came into the saloon early in the evening and was there until just before closing time, and had several drinks; that he finally had a drink he didn't pay for, either one drink or a round of drinks, and that his daughter "Babe" asked him to pay; that he didn't pay and that she struck him a blow and knocked him out of the chair.

Herman Larsen, an engineer at Rock Island, Illinois, testified by deposition that he was in the saloon on the evening of the 22nd and saw them carry a man out; that they were taking him towards the back door; that this man was standing at the bar drinking beer when the witness came in; that he saw him drinking beer and drinking whiskey and saw him give the bartender money; that he was standing at the bar drinking with Jim, the porter, and they took these two glasses and went over to a table with them; and that he, Johnson, came back and got a bottle of whiskey and then he took his change and took a drink and went to the table with it; and that he and Jim were sitting at the table at that time; that he was standing at the bar and they were at the table back of him, and the next thing he noticed Johnson was lying on the floor, and that Pype's daughter "Babe" went and kicked him; that the witness said that was not the way to treat a man, whereupon she told him to shut up or he'd get the same treatment; that at that time Pype himself was back of the bar and told witness it was none of his business; that Pype then went over to the table and the witness looked around and Pype was holding onto this man's shoulder; that then Pype started taking him away; that two fellows took him away; that the saloon was crowded at the time; that the witness was in there about fifteen

or twenty minutes; that he had never seen this man before. He says that two fellows (he did not notice who they were) took the man back to the middle room; that Pype said, "Take him out" or "Take him to the back room," and these two fellows took him away, one on each side of him.

Jules Lemajeur, a janitor, testified that he was at Pype's saloon on November 22, 1917, about seven or eight o'clock at night; that he remembers Johnson was asking for a drink and the porter "Jim" brought it over and asked him for money; the girl, "Babe," asked him for money; that he, the man, went into his pocket and all he got out was his knife and glasses, so she took the whiskey back to the bar; that "Babe" then stepped by the chair, took him by the collar and threw him on the floor; that his head went on the floor first; that he was knocked out; that there was no life in him; that she picked him up and threw him on the chair; that "Babe" said, "You men folks get away from him," and she took him by the collar and threw him on the floor and kicked him in the stomach; that he was just lying dead - he didn't move; that then the son of Pype came from the back and took him by his coat and dragged him on the floor and threw him into the back yard in the snow; that the witness saw the body of this man at the undertakers and that it was the body of the same man he had seen in the saloon; that there was blood dripping that looked like it was coming from the body; that he thought he saw a little cut some place on the head, but he couldn't remember how large it was; that one look was enough for him. The witness said it was a rough bunch and that he had an idea he might have the same medicine. He says that there were not two men who carried this man out, but that Pype's son came over and took the man by the overcoat and dragged him along and threw him outside; that he saw him go out the back door, and that this one man threw him out; that the witness went home and dreamed about this, and the

nextmorning learned that Johnson had died in Pype's saloon.

John Demeoure, a janitor, (by nationality a Belgian) testified that he accompanied Lemajeur to the saloon on the night in question; that Johnson acted like a man who was drinking; that he had half a glass of whiskey and two glasses of beer on the table and that he was drinking with the porter; that he asked for two whiskeys and two beers more from Pype; that Pype brought them over; that Johnson was looking for money in his pocket and turned it inside out and had a little snuff box and keys and glasses; that Pype then went behind the bar and that afterwards his daughter "Babe" came to the table and asked for the money of Mr. Johnson; that he was still looking in his pocket and had none; that he sat down on the chair, and that "Babe" gave him a hit in his face and he was rolling on the floor; that Mr. Pype came and took the two glasses of whiskey and the two beers away and put them on the bar and pulled Johnson up and put him on the chair again; and the man looked like he was half dead. This witness also says that "Babe" came back and said, "You don't deserve a chair under you," that she knocked him on the floor again and kicked him; and that then Pype's son picked him up by the collar and threw him outside the saloon and into the rear; that Johnson was not able to say a word. He was asked, "Where did Pype's son put him?" and answered "In the rear, outside." This witness on cross-examination said that there were ten or eleven men in there when he went in, and he gave the name of several of them. He said that he, the witness, was standing five or six feet away from this man watching him; that he had on a dirty overcoat, a cap and a dirty red sweater; that Mrs. Pype was not there but came in after the man was knocked down; that Mr. Pype's son was in the saloon all this time, "the last time he took Mr. Johnson by the coat collar and threw him from

the saloon," and further, that nobody helped Fype's son carry the man out. It was further brought out on cross examination that Lemajeur and Demesure talked about the matter after they left the saloon that evening, and that Lemajeur said that he would have to report to the police. This witness, too, identified the body of Johnson at the undertakers and said he was dressed as he was the night before except the cap. He says, "I did not see any cut on the back of his head. Blood was running from his face." The witness was asked, "Was it still flowing?" and he answered, "No. It was bloody from the night before. It was bloody, but his face was froze."

Three witnesses testified for the defendants, namely, Beatrice Dehn, formerly known as "Babe" Fype; Dr. Joseph Springer, the coroner's physician; and Henri Fype, one of the defendants. The bartender, Smith, is dead, but no reason was given for the failure to produce other witnesses.

Beatrice Dehn testified that she was in the saloon on the morning of the 23rd at about seven o'clock with Mr. McKenna, who was about seventy-five years old; that she went there to be with McKenna until her father should come down, because McKenna liked to drink and would take too much if left alone; that Mr. Smith was also there; that she had nothing to do there, was just sitting and reading the paper; that she was never in the saloon at any other time except in the morning; that she never tended bar or waited on customers; that there was a knock at the back door, which was locked; that she told Mr. Smith and Mr. McKenna to go with her to the door to see who it was, so Mr. Smith and she went to the back door; that Smith opened the door and let Johnson in and he walked up to the stove and sat down; that she does not remember what kind of a looking man he was; that he

said it was kind of cold out and walked over to the stove and she didn't pay any more attention to him; that she doesn't remember whether any drink was served to him; that when she next noticed him he was lying on the floor; that she went to see if Mr. McKenna was through with his work and happened to turn around and Johnson fell off the chair; that McKenna was at that time back of the bar; that she asked Smith to go over and wake him up and tell him to get up and that Smith came back and said he was dead; that she told him to hurry up and notify the police, and he called up the Hyde Park station and said there was a man sick and told them to send the ambulance, which later came. She said she was not in the saloon on the previous evening; that she never saw this man before; that she never on that evening or at any other time pulled this man on the floor and never kicked him; that the man was dead when the police came; that she had testified once in the police court regarding the death, but that she had never testified that Alec Johnson was in the saloon the night before he died.

On cross-examination Beatrice Dehn said she had never talked with the attorneys for the defendant about the case; that she had testified twice before in the case but had talked with nobody; that Joseph Smith used to come in mornings before going to work; that she doesn't know where he lived and doesn't know whether he was married, but that she asked him on this occasion to let this man in, to open the door; that the saloon was generally opened at 6:30 in the morning; that the back door had not been opened on this particular morning, and that probably as many as thirty customers would come in through the back door in one day; that on the evening of the 22nd she went to a theatre about 7:30 o'clock, which lasted about two hours, and got back around nine o'clock, but that she did not go into the saloon that evening;

that she went to this theatre with one Pete Lind, who lived some place on 63rd street and Stony Island avenue; that she had known him as long as she could remember. Lind was not, however, produced as a witness. She also says that she does not remember what she testified to before; that she does not remember what kind of a day it was or what kind of a night it was the night before this happened. She says that when she returned from the theatre she went immediately upstairs; that she does not know when her father came upstairs that night, but that her mother and her sisters were upstairs when she came in; that she did not see her brother that evening.

Henri Pype testified that he remembered the occasion of the man dying in his saloon; that he had never seen him before; that he did not see him the night before he died; that there was nothing unusual took place in his saloon on the evening of November 22, 1917, or on the evening before this man died; that he does not remember who was in the saloon the night before he died; that nobody was put out of his saloon that night; that he knows Lemajeur and Demesure, who testified, but does not know whether they were in his saloon the night before this man died or not; that "Babe" was not there; that she was at a theatre, and the other daughter upstairs he supposes; that he has one son, but did not see him in the saloon that night; and that he saw nobody knocked down on the floor of the saloon; that after his daughter called him, he ran downstairs and saw this man lying near the piano dead; and that that was the first time that he ever saw him.

Pype denies that he testified in the police court that he had seen Johnson in his saloon the night before he died. He says that he saw no cut on Johnson's head or blood on his face; that Demesure and Lemajeur were known to him for about four years, and that they came into his saloon two or three times a week,

sometimes during the day, not generally at night; that he did not see them in the saloon the night before this man died; that nobody told him he ought not to treat the man this way; that his wife helped him mostly in the saloon and his daughter at times in the mornings but not at night; that he does not know whether his son was in the saloon this night or not, but his son did not do anything towards helping the man out. The son, however, was not produced as a witness.

Dr. Joseph Springer, the coroner's physician, testified that he held an autopsy on the body of Alexander Johnson on November 24, 1917, at Jordan's morgue; that he found on inspection a small cut 1 1/4 inches over the left eye; that the head showed no fracture or injury; that he found no mark of external violence on any part of the body except this cut; that when he made the examination there was no blood flowing or oozing from any wound on the body; and that from his examination he was of the opinion that the deceased came to his death from organic heart disease. On cross-examination he said that he had opened and examined the stomach, but that there was no evidence of alcohol. He stated, however, that assuming the man had several drinks of whiskey and beer on the evening of November 22, 1917, and another whiskey at least on the morning of the 23rd, it was his opinion there would have been no evidence of liquor in his stomach on the 24th; that the liquor, like alcohol, would dissipate in about an hour or so; that in a live man it would dissipate in an hour. He said that acute intoxication could cause the condition which he found in the stomach; that he found no condition of the heart which was due to alcoholism.

This evidence of the coroner's physician to the effect that the death was not in any way due to alcoholism is directly

contrary to the evidence given by him shortly after the autopsy.

The defendants say that there was no evidence from which the jury could possibly find that the intoxication of Johnson contributed to his death, and that the uncontradicted evidence shows that he died from heart disease.

It may be conceded that the uncontradicted evidence shows that Johnson suffered from heart disease, but this by no means shows that heart disease was the sole proximate cause of his death. Indeed, the Statute creating a liability in cases of this kind, by its language precludes the necessity of any such proof.

An intoxicated man on his way home from a saloon where he received and drank liquor, causing his intoxication, might because of his intoxication fall on a railway track and thereafter be struck by a train; and the proximate cause of his injury would be found in the fact that he lay on the tracks; yet intoxication, while not the direct and proximate cause, would be a contributing cause, for which liability to those injured would arise by virtue of the provisions of the Statute. So, here, if we assume the diseased condition of the deceased's heart, directly and immediately, from a medical standpoint, caused his death, nevertheless the jury from the evidence could, we think, properly find that the previous intoxication was a contributing cause, and under the statute was justified in returning a verdict of guilty. A man with a diseased heart (such as the evidence here indicates) would be much less able to survive the sort of treatment the jury had a right to believe, from the evidence, was given Johnson in the saloon on the evening of November 22nd, but this would not in any way excuse that conduct or render the proprietor and lessors of the saloon less liable.

The controlling question in the case is not what the health of Johnson was, but whether the previous intoxication can be said to have contributed in part to his death. We have no doubt that it did, and we think that any reasonable person considering the facts as the same appear in the evidence would say that a jury had a right to find that, without the intoxication of Johnson on the evening of November 22nd, his subsequent death would not have occurred.

Three successive juries have passed upon this case with the same result in each instance, and with increased verdicts. We have no reason to doubt that another trial would give a similar result.

We think the defendants have received a fair and impartial trial, according to the law of the land, and the judgment is affirmed.

AFFIRMED.

McBurney, P. J., and Johnston, J., concur.

58 - 29463

PIGWATY-CLAUSEN COMPANY, Inc., Appellant, vs. JOACHIM GIRNOR and ANTON GRAMIGNO, copartners, doing business as GIRNOR BROS. & COMPANY, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, Pigwaty Company, sued the defendants, copartners, for the purchase price of certain vegetables of produce alleged to have been sold and delivered to defendants on September 11, 1924, of the total value of $358.50.

The defendants denied the sale and delivery of the goods as alleged, and denied that they were indebted to plaintiff in any sum whatsoever.

The trial was by the court without a jury, and there was a finding for defendant upon which judgment was entered from which plaintiff's appeal.

The only error assigned and argued is that the court received certain evidence which was objected to by the plaintiff. The plaintiff says that there was unimpeached evidence indicating that the goods in question were purchased and delivered and were not paid for, and that the only evidence contradicting that statement is evidence introduced over objection to the effect that the books of defendants did not show that the goods were received and that, without producing the books, a witness for defendant was allowed to testify to their contents.

As the trial was without a jury the introduction of incompetent evidence would not constitute reversible error provided there was sufficient competent evidence upon which the finding might be based. There was evidence from which the court

could have found that the goods in question were purchased by one West who was employed by the defendants with authority to sell and not to buy. There was also evidence tending to show that Mr. West sold these goods, but it does not appear that the proceeds thereof were turned over to the defendant.

There was also evidence from which the trial court was evidently convinced that the goods had never been delivered to defendants. This evidence was that of the cashier and book-keeper, who testified that it was his duty to take in the cash, prepare bills and O. K. and sign all bills of sale and all bills of purchase; that no goods were accepted by the firm unless he had accepted and placed his O. K. upon them; that he never saw these goods for which the plaintiff sued, never signed or O.K.'ed any order for them; and that, if the same had been purchased in the ordinary routine of business, they would have had his O.K.; that upon receiving a bill from plaintiffs, he at once called up plaintiff company and asked Mr. Piewsky to explain the bill, to to come down and see him personally, as he knew nothing of the purchase; that Piewsky said he would come but never did so; and that the witness never received any more statements or letters regarding the same, and never heard further until the suit.

Even if it is conceded that his further evidence to the effect that the books contain no record of the transaction was incompetent, we think the foregoing evidence was sufficient taken in connection with other evidence which appears in the case to sustain the finding of the court.

We cannot say that the finding is manifestly against the evidence, and it will therefore be affirmed.

AFFIRMED.

McCurely, P. J., and Johnston, J., concur.

63 - 29473

GOL RUBIN,
Appellant,

vs.

SAMUEL MIDLINSKY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 639

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The complainant in the trial court, who is appellant here, filed an amended bill of complaint (as amended) against Samuel Midlinsky and Israel Blume, defendants and appellees, wherein he prayed that he might be decreed to be the real and equitable owner of certain real estate in Chicago, Illinois; that Blume, the holder of the legal title, might be decreed to hold the same in trust for him and might be directed upon equitable terms to convey the same to him. The bill also prayed that a judgment against complainant held by Midlinsky might be satisfied of record.

General and special demurrers to this bill were sustained and the bill dismissed for want of equity, and the errors assigned and argued are that the court erred in sustaining these demurrers and in dismissing the bill. The facts set up were substantially as follows:

The complainant, Rubin, averred that he, with others, had for many years been dealing in vacant and improved real estate; that in the year 1911, he employed one Leviton, who was his intimate friend, as his attorney; and that for many years Leviton served him in this capacity; that in October, 1913, complainant had a deal with defendant, Midlinsky, in the course of which Midlinsky for the first time met Leviton, who thereafter also represented Midlinsky as his attorney in certain matters; that after 1913 the business relations of Midlinsky and complainant

were most confidential, each trusting the other without reservation; titles to the real estate of each was held by the other without any written agreement; money, notes and mortgages were transferred and delivered back and forth; deals in real estate and commissions entered into; building contracts carried through, etc., without any further agreement between them; and that "this fiduciary relation continued for almost six years" until complainant came to believe him, Midlinsky, unworthy of such confidence.

Further, that from December, 1913, to April, 1915, complainant was the owner of an undivided one-third of Lots 35 and 36, etc.; that Abner Bernstein was the owner of another third; and one Lillian Jackson, the owner of the remaining third part of said premises; that one Laura Brandstetter held a note for $3,000 secured by a trust deed, which was a first lien on this real estate; and one Morris Levin a note for $2,787.50, dated December 13, 1913, secured by another trust deed which was executed by Levinton, to whom the title had been conveyed for that purpose by complainants and others.

It was further averred that early in the year 1914, Levitan conveyed the premises to complainant Rubin, Abner Bernstein and William H. Jackson, as tenants in common, subject to these incumbrances; that Jackson thereafter conveyed his interest to his wife, Lillian, and that Bernstein conveyed his interest to complainant Rubin; that the trust deeds were foreclosed and that the time to redeem from the Levin foreclosure was to have expired November 26, 1916, and under the Brandstetter foreclosure January 10, 1917; that September 1, 1916, Midlinsky negotiated a sale of these lots to one Jacob Feder for a consideration of $10,500, with an agreement on Feder's part to erect a building on the premises as specified, without waiting for a deed, the plan being that Feder should place a first mortgage on the

premises as a building loan and out of the proceeds thereof pay $5,000 in cash to complainant and execute a second mortgage to secure the balance of $5,500, which was to be secured by a second mortgage on the premises for that amount, which second mortgage Midlinsky was to take for cash, retaining $500 for his compensation, the residue to be paid to complainant, who agreed to purchase the one-third interest of Lillian Jackson; that Leviton acted as legal advisor of complainant, prepared the papers, etc.; that Feder began the erection of the building but was stopped by the holder of the certificate of sale under the Brandstetter foreclosure proceedings; that on January 12, 1917, thereafter, the complainant, Midlinsky, Leviton and Feder agreed with each other that Midlinsky would redeem the premises from the sale under the Brandstetter foreclosure proceedings as a judgment creditor of complainant; and that as soon as Midlinsky should obtain the sheriff's deed he would convey the real estate to complainant or to his nominee upon the payment to Midlinsky of the costs and expenses incurred in making said redemption, with $500 for his compensation; and that the grantee in the deed to be obtained from Lillian Jackson should be such person as Midlinsky would designate; that on January 30, 1917, complainant, being indebted to Midlinsky, and in order to protect him in the advancement of the sum necessary to redeem, executed and delivered to Midlinsky his judgment note for $5,000; that it was mutually decided that the note should be for a substantial amount and should be dated back; and that, for that reason, the same was dated January 10, 1916, and on January 30, 1917, was delivered by complainant to Midlinsky; that on the following morning complainant and Midlinsky, by appointment, went to the office of Leviton; that Leviton advised that complainant had a perfect right to select his creditor under the law; that Leviton drew the necessary papers and caused the judgment to be entered

directed Midlinsky to get $4,800 in currency and meet him and complainant in the sheriff's office so that redemption could be immediately made; that Leviton, Midlinsky and complainant did meet at the sheriff's office, where Midlinsky deposited with the sheriff $4,893 for the redemption of said real estate; that March 6, 1917, the premises were bid in by Midlinsky at the sheriff's sale for the amount deposited with the sheriff, and the premises were sold to him, and Midlinsky procured from the sheriff a deed to said premises dated March 8, 1917, which was duly filed and recorded; and that complainant paid the costs and expenses of the judgment at that time; that pursuant to agreement complainant on February 19, 1917, procured the conveyance from Lillian Jackson of her interest in the premises, and for convenience and at request of said Midlinsky, Leadore Bernstein, a relative of Midlinsky, was named as grantee, and the deed was prepared by said Leviton at complainant's direction and was by complainant delivered to Leviton for record, complainant paying the recorder's fees; that on March 26, 1917, Midlinsky and wife, by direction of Leviton, acting as complainant's attorney, conveyed all their interest in said premises to Abraham Kerstein, the father of Midlinsky's wife; that deeds from Midlinsky to Kerstein and from Bernstein to one Harpes were made as a result of a consultation with and under the advice of Leviton acting as attorney for complainant, for the purpose of having a partition proceeding brought to quiet title, the Chicago Title and Trust Company having on April 10, 1917, upon a request for a guarantee policy rendered an opinion in which Midlinsky was found to be the owner of an undivided two-thirds and Morris H. Levin the owner of one-third of said premises; that the bill of the Chicago Title and Trust Company was paid for by complainant.

Thereafter it is averred a bill for partition of said real estate was filed by Abraham Kerstein against all parties claiming an interest or title to said real estate; that this bill was filed by Leviton as solicitor for the complainant; and that complainant paid the costs of bringing the suit; that Leviton did not know Kerstein and had never met him; that his whole connection with the premises was brought about the complainant in whose behalf Leviton was supposedly acting; that complainant was not a party to said suit; that the suit was contested by Morris H. Levin only, was referred to a master, who made his report, finding Abraham Kerstein owned two-thirds; Rebecca M. Karpas one-third of said premises.

Exceptions being filed to the master's report by Levin, the same were sustained, and February 11, 1921, a decree of sale under said partition proceeding was directed and the sale made March 18, 1921, by the master. Defendant Blume was the purchaser at this sale for the sum of $8,000. Blume, it is averred, had for a long time been an intimate friend and associate of Midlinsky, was familiar with the relations between complainant and Midlinsky and Leviton, and at the time he bid at said sale well knew that complainant claimed a substantial interest in said premises, and had actual and constructive notice thereof, and that by reason of his said knowledge and notice, complainant charges, he was not at said sale an innocent purchaser for value of said premises; that prior to said sale, and with full knowledge of complainant's rights in the premises, and with intent to defraud complainant, said Blume, Midlinsky and Leviton conspired together to obtain at said sale an advantage over complainant and to defraud him out of his rights in and to said lots.

The bill further avers that Leviton, while acting

as complainant's attorney, advised complainant to stay out of the suit and let him run it for him; that complainant relied on Leviton to protect his rights and interest in the premises; that Leviton, disregarding his duty to complainant, procured, with the aid of Midlinsky, said Blume as purchaser of said property at said sale for $8,000; and in furtherance of said scheme to defraud complainant, Blume, with the aid and connivance of said Midlinsky and Leviton gave a note for $3,500, secured by a trust deed due on or before one year from date, March 18, 1921, caused the same to be recorded, obtained a quit claim deed from Levin of the same date, which was also recorded.

Complainant and Midlinsky at and for many years before the dates hereinbefore set out, were friendly and intimate, and their relations of the most cordial nature. On many occasions they freely and without question or reserve extended to each other the courtesies and accommodations that neither of them would for a moment consider extending to any other person.

It is averred that "the real estate hereinbefore described was the property of complainant at all times, and Midlinsky and his grantors held merely the naked legal title thereto in trust for complainant;" that on September 10, 1919, complainant, having exhausted all other means in his power to obtain just and equitable treatment from Midlinsky, filed in the Circuit court his bill for accounting, making Midlinsky defendant thereto; that in his bill he set up his rights and claims to the premises; that the summons was returnable to the October term 1919, was duly served, and that thereby that proceeding became and was lis pendens and notice to the world of the rights and claims of complainant therein, as by that bill disclosed, and pending when Blume obtained his title thereto; that thereafter and to further their scheme to defraud complainant,

Midlinsky, Blume and Leviton conspired to obtain from the Chicago Title and Trust Company its guarantee policy in the sum of $20,000, running to Blume, guaranteeing his title to said lots, subject only to the trust deed for $3,500 in the usual formal exceptions, disregarding complainant's rights and claims as set up in his bill filed, thereby making it possible for Blume to further cloud the title of complainant to said lots by transfer or incumbrance thereof; that the premises were vacant, unoccupied and unimproved by any building, and worth about $25,000; that the judgment entered January 31, 1917, favored Midlinsky against complainant, and still remains wholly unsatisfied of record, although the sole object of the entry had been fully performed and Midlinsky or his assigns had been fully paid, as shown by the decree of court confirming the report of sale and distribution in the partition proceeding.

The amendment to the amended bill set up somewhat in detail that on July 3, 1913, complainant delivered to defendant, Midlinsky, a $8,000 note secured by second mortgage, which Midlinsky used as collateral until March 26, 1917; that Midlinsky advanced to complainant about $4,400, and then agreed to advance more from time to time as needed; and that on March 26, 1917, complainant paid to Midlinsky $4,500 and took up this paper; that the intimate relations between complainant and Midlinsky continued without interruption from the beginning thereof to about April, 1919, at which time, in order to adjust all differences between them, they requested their friend and attorney, Charles Leviton, to arbitrate all money matters between them, which he undertook to do, and at that time deeds from Aerstein and Midlinsky to the premises in question and other property were deposited with Leviton to convey same to complainant upon payment by him of whatever sums might be found due from him to Midlinsky; that said agreement to arbitrate was never performed and no award was ever made by

Leviton; that neither Midlinsky nor Leviton knew that said judgment upon said $5,000 note was unsatisfied of record; that said Midlinsky, Leviton and complainant all considered said judgment wiped out by the redemption proceedings and knew that the judgment had accomplished its entire purpose when said redemption was made; that on April 21, 1930, Midlinsky filed a creditor's bill in the Circuit court, based on said judgment, summons being returnable to May term 1930, which was duly served; that in that proceeding Midlinsky set up the rights and claims of complainant in and to said premises; that thereby the said proceeding was lis pendens and notice to the world of the rights and claims of complainant in and to said premises; that said suit was pending at the time said defendant Blume obtained his title to said real estate, and that such title so obtained by him was subject to the right, title and interests of complainant therein, and was subject to notice of all the rights, title and interest of complainant in said premises when said Blume obtained his title.

It is a fundamental rule in chancery pleading that a demurrer admits all the facts stated in the bill which are well pleaded, but that such admission cannot supply defects in substance, cure a defective title, nor establish one which is defectively set forth. Mills v. Brown, 2 Scam. 558. A demurrer in chancery is to the merits and in bar of the relief sought. It is based upon the theory that, admitting the facts stated in the bill to be true, the complainant is not entitled to the relief prayed in his bill. "It is always founded upon some strong point of law going to the absolute denial of the relief sought, but defects in substance are not supplied or aided by it, nor defective statements of title or claims to relief cured by it. The demurrer admits only that which is well stated or pleaded." Stowe v. Russell, 36 Ill. 29. A demurrer, therefore, does not

admit matters of law alleged in the bill or stated or inferred by the pleader from the facts as stated. Spaula v. Hatch, 33 Ill. 126; Harris v. Carnell et al., 80 Ill. 63. A general demurrer to a bill in equity should not be overruled if any of the claims set forth are proper for the consideration of a court of equity. Miller v. Hale, 308 Ill. 275.

As to fraud, conspiracy and fiduciary relationships, the rule is that the mere averment by a pleader of such fraud, conspiracy or relationship is not sufficient even when met by a general demurrer. Facts tending to implicate the defendants in such practices should be stated (Davis v. Pickett, 72 Ill. 483) and the facts averred tending to show such relationship, fraud or conspiracy must be taken most strongly against the pleader. Sterling Gas Co. v. Ligby, 134 Ill. 568; The State v. Ill. Cent. R. R. Co., 246 Ill. 244; Sanitary Dist. v. Gifford, 257 Ill. 424; Harrigan v. County of Peoria, 269 Ill. 45; Wandschneider v. Wandschneider, 282 Ill. 297.

The reason for this rule is that in matters of this kind fraud, conspiracy and fiduciary relationships are in each case respectively an inference from the facts and the facts therefore and not inferences therefrom should be pleaded. Encyclopedia of Pleading and Practice, vol. 9, pp. 684 to 687, and the same vol. 12, page 1041. In the first named authority it is stated:

> "In alleging fraud, it is well settled both at law and in equity that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient. Whether the fraud be alleged in the declaration, complaint, or bill, or set up by oral defense in the plea, answer, or replication, it is essential that the facts and circumstances which constituted it should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer. The reason for this rule is that fraud is a conclusion of law from facts stated, and it is a well settled rule of pleading that facts, and not legal conclusions, are to be pleaded. Mere general averments of fraud or the fraudulent conduct of a party, without the

facts, do not constitute a statement upon which the court can pronounce judgment. It is not necessary, however, that all the minute facts tending to establish or affirm the allegation should be set forth; a general averment of the facts from which, unexplained, the conclusion of law arises, is sufficient."

Bearing in mind these fundamental principles and stripping the bill as amended of unnecessary verbiage and of the conclusions of law therein stated, we find some difficulty in determining the theory upon which complainant seeks to maintain his bill.

The first contention seems to be that while defendant Blume has the legal title by a deed from a Master in Chancery, absolute on its face, facts are alleged from which it is claimed th the court might hold that the same should be construed as a mortgage, in which case complainant would be the mortgagor and the defendant Blume a mortgagee. Pearson v. Pearson, 131 Ill. 464, and Friend v. Beach, 276 Ill. 397, are relied on in this connection. The first of these cases was one where a complainant whose land had been sold on execution gave his note to a creditor for a sum in excess of his indebtedness, and confessed judgment thereon, also furnishing the money necessary to redeem from the sheriff's sale under an agreement with his creditor that the creditor would redeem and take title in his behalf and thereafter convey it to the complainant upon payment of the indebtedness incurred. The court held upon familiar principles that there being no intention to defraud creditors, a bill for specific performance of this contract to convey would lie. It is, of course, always permissible to prove by oral evidence that a deed absolute in form is in fact a mortgage and it is invariably the rule that where one party furnishes the consideration for a title which is placed in the name of another, equity will impress the title with a trust in favor of the party who furnishes the consideration. But, in order that a deed absolute on its face may be construed to be in fact a mortgage, it must

be shown that there is a valid subsisting obligation which the deed is intended to secure, and it must be an obligation so definite and clear that it might be enforced in an action at law. (See Kelly v. Lehmann, 297 Ill. 58, and many other cases therein cited).

Here there is no allegation that Blume purchased with Rubin's money. It is not averred that Rubin is indebted to Blume in any way. The relationship of creditor and debtor does not exist between them as it did between the parties in the cases upon which complainant relies. Rue v. Dole, 107 Ill. 275; Carpenter v. Plagge, 192 Ill. 82; Gannon v. Moles, 209 Ill. 180; Burnett v. Osborne, 172 Ill. 227. Whatever the rights of the parties may be under the facts as averred in this bill, it is clear that Blume does not hold as a mortgagee of Rubin and that Rubin's bill cannot be maintained upon that theory.

Nor do we think that under the facts as stated in the bill it can be held that Midlinsky, in receiving the deed from the sheriff and making redemption from the foreclosure, became Rubin's mortgagee, and this for the reason that Midlinsky used his own - not Rubin's - money in that transaction. The bill does not allege that Rubin contributed either the whole or any adequate part of the amount necessary to complete that redemption. Rubin had been divested of his title by the foreclosure proceedings. Midlinsky advanced $4,293 of his own money in order to accomplish the redemption. Midlinsky as a creditor had a right to redeem. He was entitled to a note for the amount due to him from Rubin, and he was entitled to a confession of judgment in that amount. Assuming, therefore, that Blume had full knowledge of the transaction between Midlinsky and Rubin, this would not have prevented him from taking an unimpaired title under the sale in the partition suit made by the Master in Chancery. The com-

plainant can, therefore, not recover upon the theory either that Blume is equitably a mortgageeor that Midlinsky was equitably a mortgagee, and that Blume took the title with knowledge of that fact.

It is, however, further suggested that the bill may be sustained upon the theory that there was such a fiduciary relationship between the parties as to constitute Blume complainant's trustee. Here, again, whatever the facts might be as to Midlinsky, there can be no doubt upon the facts as pleaded that there is nothing by which Blume might be charged with a fiduciary relationship to Rubin. Blume was not the agent or representative of Rubin in any respect, and it is not so alleged, nor is any fact alleged from which an inference of such relationship might be drawn. There is no charge of any specific agreement between defendant Blume and complainant Rubin with reference to the purchase of the title at the master's sale, nor is it made to appear that any part of the consideration was furnished by the complainant.

Nor, indeed, are facts alleged from which we may conclude that in this particular transaction Midlinsky acted in that particular relationship. There is a general charge of conspiracy on the part of Blume, Midlinsky and Leviton, and there is, as to Leviton, a charge of a confidential relationship, but he is not made a party to the suit, and specific facts from which any such inference might be drawn either as to Midlinsky or Blume are wanting.

No express trust is alleged, and if the bill is to be sustained it must be upon the theory that the facts alleged are sufficient to impress a resulting or constructive trust in favor of Rubin upon the land, the title to which stands in the name of Blume.

As we understand the decisions of our Supreme Court, constructive trusts in this State are of two general classes. One of these is known as trusts ex maleficio, which consists of those cases in which actual fraud is considered as an equitable ground for raising a constructive trust; and the second consists of those cases in which the existence of a confidential relation and a subsequent abuse of the confidence reposed is considered sufficient. As we have already said, the facts averred in the bill are not sufficient to establish a confidential relationship between Blume and complainant, for it does not appear by any facts averred that Blume stood in any situation with reference to complainant, wherein complainant had any right to consider him as in a confidential relationship. He was in no sense the agent of Rubin, and Rubin placed in his hands no money or property, made no request and, so far as the bill shows, relied upon him in no way whatsoever in the transaction. Nor, stripped of averments as to what the law is and of conclusions of the pleader, are facts averred sufficient to establish a trust ex maleficio. As was said in Davis v. Stumbaugh, 163 Ill. 557, "In order to take the case out of the Statute and establish a trust ex maleficio, the transaction by means of which the ownership of property is obtained must be in fact a scheme of actual deceit, - in other words, there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated; (2 Pomeroy's Equity Jurisprudence, secs. 1055, 1056) otherwise the Statute of Frauds would be virtually abrogated."

There is, in the averments of this bill, no scheme of actual deceit shown; indeed, for aught averred in the bill it would appear that the complainant had actual knowledge of every step taken in the different transactions which resulted in

placing the title to the property in the name of Blume. He alleges that the sale was for an insufficient price, but he does not allege that he did not know when the property was to be sold nor that he was in any way prevented from obtaining bidders for it or from bidding on it himself. He alleges in general terms a conspiracy, but when we examine the facts it does not appear that there are any upon which such averment could rest. It is averred that the sale was made for an insufficient price, but whether that was an insufficient price at the time the sale was made is not set forth, nor whether it sold for more or less than the appraisement put upon it by the commissioners, whom we must presume were appointed in the partition suit. A court of equity will go a long way to relieve from an actual fraud perpetrated, but the injured party must in his bill set up facts from which it can be clearly seen that he has in fact been defrauded. His mere conclusions will not avail.

For the reasons indicated the decree will be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

79 - 29487

PEOPLE OF THE STATE OF ILLINOIS ex rel. FRANCIS A. BUSON et al., Appellees,	APPEAL FROM
vs.	CIRCUIT COURT,
JOSEPH PAZLIK et al., Appellants.	COOK COUNTY.

237 I.A. 639

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by certain defendants from a final decree entered in the Circuit Court.

Number eighteen of the rules of this court provides that "the abstract must be sufficient to present fully every error and exception relied upon." This important provision of that rule seems to have entirely escaped the attention of the defendants.

Neither the bill of complaint, the decree entered in the cause, a petition to suppress certain evidence and quash a certain search warrant, nor the affidavit for such search warrant are abstracted. The only points presented in the brief and argument are that this search warrant was illegal and that a motion to suppress evidence obtained by means of it should have been allowed.

It has been many times held by the courts of appellate jurisdiction that the record will not be searched for grounds for reversal, and that such grounds must be made to appear from the abstract. Kennedy v. Lawrence, 238 Ill. 199; Gage v. Chicago, 211 Ill. 109; Gibler v. Hutton, 167 Ill. 13; Ward v. Int. Com., 304 Ill. 376; Udstuen v. Ilik, 291 Ill. 443; Butler v. Brotherhood, 214 Ill. App. 376; Cahill v. Printz, 133 Ill. App. 604.

As the abstract preserves no question for review by this court the decree is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

29509

100 - 29509

J. C. WILLIAMS,
Appellant,

vs.

FRANK F. FERRONIA,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

237 I.A. 639

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order entered by the trial court which dismissed his suit without a hearing. The record indicates that judgment by confession was entered in plaintiff's favor upon a promissory note, containing a power of attorney, authorizing the entry of judgment thereon at any time after maturity. The defendant appeared and made a motion to vacate the judgment supported by an affidavit which was by the court adjudged to state a sufficient defense, and the motion was therefore granted and the judgment set aside.

The record further shows, however, that plaintiff's suit was thereupon dismissed without further proceedings. This dismissal of the suit was error, for which the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

109 - 29518

LEONARD OLUND, doing business as THE BRANDON POTATO COMPANY,
Appellee,

vs.

JOE LEVIN, doing business as the WEST END PRODUCE COMPANY,
Appellant.

237 I.A. 639

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

With aid of an additional abstract filed by the plaintiff, who is appellee, we are able to ascertain that the plaintiff filed an amended statement of claim in which he claimed that there was due to him upon an accounting with the defendant the sum of $1,878.53 for commissions and monies advanced by him at defendant's request in the purchase in Minnesota and shipment to defendant at Chicago, Illinois, of certain potatoes, according to the terms of a verbal contract made at Brandon, Minnesota, on September 1, 1921. Attached to the statement of claim is a bill of particulars showing the dates of shipment, the particular numbers of the respective cars and the commission as claimed on each shipment.

The statement avers that the agreement was that plaintiff should receive for his services , where purchases were made of potatoes loaded on the cars, the sum of $10 per car, and in cases where the same were not loaded but plaintiff was required to load them, a commission of ten cents per hundred.

The affidavit of merits denied the making of the contract and denied its terms as alleged and denied that plaintiff had advanced monies as claimed.

Defendant admits that he paid to plaintiff the

sum of $5,402.14, but denies that he is indebted in the further sum as claimed. As an affirmative defense, the defendant alleged the fact to be that the plaintiff agreed to ship to the defendant potatoes of a certain grade to be billed to the defendant at cost plus $10 per car commission; that certain of the shipments of potatoes forwarded by the plaintiff to the defendant were below grade and were very poor quality; and that, upon arrival at Chicago certain cars of potatoes were rejected by defendant and held subject to the orders of the plaintiff; that thereafter the plaintiff instructed the defendant to sell for his account to the best possible advantage such rejected cars of potatoes; that said instructions of the plaintiff were carried out by defendant and defendant remitted to plaintiff the money realized from the sale of said rejected carloads of potatoes, but added thereto one-half the difference between the amount paid by defendant to plaintiff on arrival of the potatoes at Chicago, and the price at which said potatoes were billed to this defendant by plaintiff.

The issues were submitted to a jury, and there was a verdict in favor of the plaintiff for the balance claimed to be due upon which the court, after overruling motions for a new trial and in arrest, entered the judgment from which this appeal is taken.

The defendant in his abstract and briefs has practically disregarded the rules of this court and the labor of this court has been thereby much increased. Rule 19 provides that in cases depending upon the evidence the leading facts which such evidence proved or tended to prove without discussion or argument and without detail should be set forth. Instead of this, the defendant has furnished a one-sided statement of the facts, interwoven with an attempt to argue his own side of the case. Wholly

uncalled for language is used in references made to the witnesses and in suggestions as to the attitude of the trial court.

It is urged that the court erred in admitting in evidence certain copies of exhibits, but the evidence is not pointed out nor is there any reference to the abstract by which this evidence complained of can be identified. It is complained that the court rejected proper evidence offered on the part of the defendant, but here again there is no reference to the page of abstract or record by which the evidence can be identified. Under the heading of "Divers Other Errors Apparent on the Face of the Record," there is a reference to the abstract and quotation therefrom, in which it appears that defendant, on cross-examination, asked a witness a question with reference to bills of lading for eighteen cars; that an objection was made by plaintiff's attorney and the court ruled that the witness might answer if he knew; that defendant's attorney then said, "Get me those papers there, will you?" whereupon the witness left the stand and went to get the papers, further answering, "I haven't got them now;" that defendant's counsel then asked where these were, and the witness replied that he didn't know; that the witness was then asked if he had not testified "in connection with these papers yesterday" to which he replied, "Yes sir;" that, being further requested to produce them, he stated that he did not know where he had laid them; that the attorney for the defendant then asked the court to instruct the witness to produce the papers; that the witness explained that he had mislaid them but that he would make a search for the papers and bring them if he could find them.

It does not appear that the court made any ruling on the matter or was requested to make any ruling on it, yet, this is cited as one of the errors apparent on the face of the record.

Under the heading of "Points and Authorities," the brief cites ~~xxxxx~~ well-known authorities in regard to the facts necessary to constitute an accord and satisfaction, and argues at some length that the receipt and acceptance of two checks of defendant by plaintiff constituted such accord and satisfaction which preclude a recovery. This defense, however, is apparently brought forward for the first time in this court. The affidavit of merits does not set up any such defense, and after an examination of the evidence, we think it is perfectly apparent that no such defense in fact was proved. At any rate, on the record, it would have been a controverted question of fact which is settled adversely to the defendant by the verdict of the jury.

As a matter of fact, the defendant presented only two defenses. One was that the contract upon which suit was brought was made by plaintiff with one Skullerup and not with defendant. The whole course of business shows that this was not true, and many letters of defendant to plaintiff which are presented in the additional abstract of record filed by the plaintiff shows that the jury was justified in returning a verdict for plaintiff on this point.

The other defense was to the effect that seven cars of the potatoes which were shipped by plaintiff were of poor quality, and there was testimony given by the defendant, together with two of his employees, to the effect that, after an examination of the potatoes had been made by plaintiff and defendant, they agreed that each should share one-half of the loss sustained on this account.

The plaintiff denied the conversation testified to by defendant's witnesses; indeed, his testimony was positively to the effect that, as to one witness, plaintiff had never seen him.

It is apparent that the jury believed the evidence of the plaintiff on this point, and we do not think that we are able to say that the finding of the jury is against the manifest weight of the evidence.

The controversy between plaintiff and defendant arose at a time when it would have been an easy matter for defendant to have preserved the evidence as to the price at which the potatoes of the supposed poor quality were sold, but this evidence was not preserved, the defendant testifying that the books which would show the sales and disposition which had been made of the potatoes were lost or destroyed.

We agree with the jury as to its verdict and with the court as to the judgment entered upon that verdict, and it will be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

If in counties where the party machinery has evaporated or the primaries are open primary, one be allowed vote in one party primary in one year then the chances of the party to nominate the candidates suitable at the elections.

The administrative machinery principle was introduced, since it is some time it would have been one of many reforms the Government is also considering the evidence as to the point of view the majority of the respondent voter majority view vote, but that individual political primary. The Commission participated that the majority which vote for major and disadvantage which are from main of the primary have Bill is necessary.

We agree with the party we is the written and also the main of the primary voters that the primary voters must that system, and is will be effective.

Adjourn.

Mr. C. J. McCarthy, Jr. present.

43820

119 - 29528

JOHN CARROLL et al.,
ELIAS NIEMAN and
DOROTHY SHERWIN,
Appellants,

vs.

LOUISE KIESELBACH et al.,
and IDA KIESELBACH,
Appellees.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

237 I.A. 640

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellants appeal from an order entered by the trial court overruling certain objections to the report of a receiver and directing distribution of the funds in his hands. The material facts are stipulated.

Dorothy Sherwin was the owner of a note secured by a trust deed which conveyed to appellant John Carroll, certain premises which were owned by appellee Louise Kieselbach. Default having been made in the payment of interest due upon the note, on April 28, 1922, Dorothy Sherwin filed her bill to foreclose this trust deed. A decree in favor of the complainant was entered on the 5th day of July, 1922, and a certificate of sale was issued to her, and a deficiency decree against Louise Kieselbach was entered in her favor for the sum of $510.37. The total amount due to complainant at the time of the sale was $8,237.62, which included costs to the date of sale.

This certificate of sale was by Dorothy Sherwin assigned to Elias Nieman, and the premises not having been redeemed a master's deed was issued to him on the 4th day of November, 1923.

July 14, 1923, a receiver was appointed who collected rent from the premises from July 15, 1923 to November 15, 1923, in the total sum of $1,200 - $75 per month.

September 1, 1923, Louise Kieselbach, then the owner of the equity of redemption, conveyed to Ida Kieselbach all her interest in the premises described in the decree and also assigned to her any and all right to any money in the hands of the receiver. After the period of redemption had expired Ida Kieselbach filed her petition in which she prayed for a final accounting by the receiver, and that upon such accounting an order to pay her the money in his hands over and above the costs of the receivership and the amount necessary to satisfy deficiency decree with interest should be entered.

The receiver filed his final account in January, 1924, (a prior report having been filed by him and approved in August, 1923.) His final account showed the collection by him of $1,209, and that he had paid to Dorothy Sherwin a total sum of $762.31. Ida Kieselbach objected that the total payment made to Dorothy Sherwin included the sum of $72.75 as master's fees which, as a matter of fact, had been included in the deficiency decree; and further, that Mrs. Sherwin was entitled to receive only the sum of $510.37, the amount of the deficiency with interest. The court, upon the hearing, found that the $72.75 was included in the deficiency decree and that Dorothy Sherwin was entitled to $510.37 with interest thereon amounting to $17.

The court further found that Elias Kiesen, to whom the deed was issued, was entitled to rent from November 4, 1923, to November 15, 1923, amounting to $27.50, and that Ida Kieselbach as grantee and assignee of Louise Kieselbach was entitled to receive the sum of $323.80; and Dorothy Sherwin (having received from the receiver $234.88 more than she was entitled to) was ordered to pay the receiver that amount.

The trust deed in question contained the following provision: "The grantor waives all right to the possession of any income from said premises pending foreclosure proceedings, and until the period of redemption from any sale thereunder expires, and agrees that a receiver shall be appointed to take possession of said premises and collect the income therefrom, and the same, less receivership expenses, pay over to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money if said premises be redeemed."

It is contended, in behalf of Elias Nieman and Dorothy Sherwin, that under this provision of the trust deed they were respectively entitled to the rents arising during the pendency of the foreclosure proceedings and the running of the period of redemption, and Schaerni v. Bartholomae, 118 Ill. App. 316, is cited as a case "which is on all four's with the instant case." Unfortunately, however, for this contention, this case cited and relied on was reversed by the Supreme Court in 217 Ill. 105, the court there holding that the trust deed was merged in the decree of foreclosure, and that the owner of the equity of redemption was entitled to the rents from the premises, after the satisfaction of the indebtedness. This case as well as that of Standish v. Musgrove, 223 Ill. 506, and other cases in the Supreme and Appellate courts are conclusive against appellants on this point.

Complaint is also made as to the amount of fees allowed to the receiver and to his attorney, but as the parties complaining have no interest in the fund, they clearly have no standing to make objection in that regard.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

29537

129 - 29539

ELEANOR B. NELSON, Complainant, vs. HERMAN URBAN, Doing Business as MANOR MAINTENANCE CO., et al. Defendants. On Appeal of STANDARD SANITARY MANUFACTURING COMPANY, a Corporation, Appellant-Defendant, vs. MILLER PLUMBING & HEATING SUPPLY COMPANY, a Corporation, Appellee-Defendant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY. DECREE OF DISTRIBUTION.

237 I.A. 640

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The questions arising on this appeal have been considered and our views thereon expressed in opinion this day filed in the case of Eleanor B. Nelson, appellee-complainant, vs. Herman Urban, Doing Business as Manor Maintenance Co., et al., General No. 29538. It is unnecessary to here repeat what was said in that opinion.

In conformity with the views therein set forth, the decree will be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

154 - 29570

4 3842

ALEXANDER J. JANUSKOWSKI,
Appellee,

vs.

D. STANLEY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 640

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued (and on the finding of the court recovered a judgment in the sum of $196.00) on account of damages alleged to have been sustained in a collision of the automobiles of plaintiff and defendant on the evening of December 18, 1922, in the city of Chicago, at the intersection of 89th street, a public highway extending east and west, and Exchange avenue, another public highway extending north and south.

The plaintiff's automobile (a Dodge roadster) was at the time in question being driven by one Lackanski and in a westerly direction on 87th street, while defendant's automobile (a Cadillac) was being driven in a northerly direction on Exchange avenue.

There is conflicting evidence as to the rate of speed at which the automobiles moved and as to the degree of care exercised by each of the drivers.

The plaintiff has not appeared in this court and defendant earnestly contends that the judgment should be reversed as against the manifest weight of the evidence and because, as argued, the plaintiff was guilty of contributory negligence. Hilton v. Leeman, 212 Ill. App. 255, and similar cases from this and other courts are cited by defendant. We are, however, of the opinion that on the uncontradicted evidence the judgment must be affirmed. Section 33 of the Motor Vehicle Law provides in substance that vehicles

on the public highway approaching on the intersecting highways from the right shall be given the right of way by vehicles approaching the same intersection from the left. This section of the statute has been considered by this court in Cambridge v. Sherrazin, 225 Ill. App. 509. In that opinion we suggested "That a vehicle is approaching an intersection from the right, within the meaning of the statute, and entitled to the right of way then, on its left, on an intersecting street, another vehicle is approaching whose driver, in the exercise of due care, would or should see that unless he yielded the right of way the vehicles might or would collide." This court is of the opinion that universal observance of this rule would tend to lessen very much the too frequent collisions at crossings in the city of Chicago. In conformity with this rule, we think that in the instant case the plaintiff had the right of way. (See also McCarthy v. Fadin, No. 19333, not yet reported.)

The judgment will be affirmed.

AFFIRMED.

McBurney, P. J., and Johnston, J., concur.

163 - 29570

4385

W. H. MEITZLER,
Appellee,

vs.

JAMES E. COOK and MARTIN MATHESON, Doing Business as COOK & MATHESON,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 640

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellee here, sued, claiming that he was employed by defendants as a real estate salesman on a commission basis, and that, pursuant to his employment, he sold certain property and that for his services in that regard he was entitled to the sum of $495 which defendants promised to pay but failed to do.

The defendants admitted the employment but denied that plaintiff sold the property as alleged, denied that $495 was due to plaintiff or that the defendants promised to pay plaintiff that amount or was indebted to plaintiff in any sum whatever.

There was a trial by the court and finding and judgment in plaintiff's favor for the sum of $300.

The defendants argue that, under the facts as disclosed in the record, they were entitled to a continuance of the cause, which was denied.

It appears from the record that the trial commenced on February 19, 1924, at about the hour of 2:30 p. m., and that at the commencement of the hearing the attorney for the defendants was not present; that the attorney for plaintiff stated to the court that the attorney for the defendants was there at two o'clock and wanted a continuance, and that the attorney for the plaintiff had said that he would admit "anything he said his

man would testify to." Thereupon, the court asked if he was still willing to do that, and the reply was "Yes," whereupon the court directed the trial to proceed. Thereupon the plaintiff was sworn and certain documents introduced in evidence, and while the examination of the plaintiff was proceeding, the attorney for defendants entered the courtroom, stating that he had just been out at the telephone asking his office to send over the files in the case; and that he would like to make a motion. He then stated that on that morning, for the first time, at about 9:30, he had learned that Mr. James B. Cook was ill and that he promptly called the attorney for the plaintiff and told him that he would ask for a continuance at two o'clock, and produced a certificate of a doctor upon the basis of which he moved for a continuance of the case. The certificate of the doctor was as follows: "February 18, 1934. To Whom it May Concern: This is to certify that I have examined Mr. James B. Cook and find him suffering from acute Coryza. He is confined to his home. Wm. F. White." Thereupon the attorney for plaintiff stated that if counsel would make a statement of what he could prove by Mr. Cook, he would admit that, if Cook were present, he would so testify, to which attorneys for defendants replied that he could not tell that until "I know what you are going to prove," and said that he would make such a statement at the end of the case, which the record shows he did. The court thereupon directed the trial to proceed.

There was no attempt on the part of defendants to complywith the requirements of the Statute with reference to continuances, and we think the court was justified in directing the trial to proceed under the circumstances.

The defendants now contend that "the plaintiff's attorney agreed in open court to admit <u>the truth</u> of any evidence

which the defendants' attorney would say that Mr. Cook would give were he present," but the record does not bear out that assertion, and we think the only inference to be drawn from the agreement is that it was admitted that, if the witness Cook were present he would testify as stated by counsel.

It is also urged in defendants' behalf that the court erred "several times in permitting plaintiff to introduce incompetent and immaterial testimony." From a careful examination of the record we are disposed to agree that this is true, but the admission of such testimony upon trial by the court is not necessarily reversible error, where there is sufficient competent evidence upon which to base the finding of the court. This has been declared to be the law so often by the courts of this State that it is unnecessary to cite authorities.

It is not controverted that the plaintiff was employed by the defendants and that, while so employed by them, he procured the execution of a contract which is in evidence for the sale of certain real estate. This contract is dated January 23, 1923, and, by its terms, Della D. Levine agreed to purchase from Harry G. Matthews and Alice Matthews certain real estate for the price of $27,500. The contract provided, "Should the said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vender, be retained by the vender as liquidated damages, and this contract shall thereupon become and be null and void. Time is the essence of this contract and of all the conditions hereof."

It is an undisputed fact that Della D. Levine, under the terms of this contract, paid to plaintiff, acting for defendants who were to represent the parties as brokers, the sum of $500 as earnest money, and with reference to this the contract provided:

"This contract and the said earnest money shall be held by Cook and Matheson for the mutual benefit of the parties concerned, and, after the consummation of the sale, he shall be at liberty to retain the cancelled contract permanently; and it shall be the duty of said Cook and Matheson in case said earnest money be retained as herein provided, to apply the same first, to the payment of any expenses incurred for the vendor by his agent in said matter, and second, to the payment of vendor's broker of a commission of three per cent on the selling price herein mentioned, for his services in procuring this contract, rendering the overplus to the vendor."

The plaintiff testified that the terms of his employment was that defendants would give him 60% of the commissions on the sale of property with which he had anything to do with selling, whether he closed the contract or not, and that commission was paid to him upon this basis; that some time after the execution of this contract he had a talk with Mr. Cook and Mr. Matheson, and asked for his commission, and that they said they would settle it within the next week; that he had from time to time asked them when they were going to settle with him, and that they replied that the matter had not been cleared up, and put him off. It further appears (and we think this was competent testimony, although defendants contend otherwise) that he had told defendants of a conversation that he had with Mrs. Levine, in which she told him that Mr. Levine had a chance to buy an interest in the business where he was employed and was not going through with the deal; that Mr. Matheson said he would immediately go over and see what he could do; that Mr. Matheson wrote Levine a letter and kept the $500 delivered under the contract in escrow. Mr. Matheson was not called as a witness nor is any excuse given for his failure to testify.

At the close of plaintiff's evidence the attorney for defendants stated that if Mr. Cook were there he would testify that plaintiff was employed simply under a verbal contract, by which in certain cases he was to get 50% of all commissions earned as and when the commissions were collected; "That in the transaction at bar the plaintiff was to receive 1/6 of commission earned by Cook and Matheson as and when the same was collected by them; that Cook and Matheson have collected no commissions in this case."

The uncontradicted evidence showed that the commission of Cook and Matheson would be 3% of the price of the real estate sold, and we think we may not say that a finding of the court from the evidence, in accordance with the testimony of plaintiff, is against the manifest preponderance of the evidence. The court evidently allowed only 6% of the amount which had been paid in as earnest money, and the defendants earnestly contend that, according to the terms of the contract, this earnest money had not yet been forfeited and was, therefore, not applicable to the payment of commissions. Whether it was technically so forfeited we do not think it is necessary for us to decide, although there is competent evidence in the record (not abstracted as to the vendor) from which such forfeiture could be implied. It is, however, perfectly apparent, we think, that, at any rate, the commissions of Cook and Matheson growing out of this transaction to the extent of $800 was already in their hands, and the court limited the recovery of plaintiff to that amount. The commission was certainly payable in a reasonable time, which had elapsed.

We think substantial justice has been done, and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

210 - 29627

4/3

LIXX KRAUS,
Appellee,

vs.

MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corp.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 640

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case brings before us for review a record from which it appears that the plaintiff sued claiming that the defendant was liable, under the terms of an accident insurance policy which is in evidence, to pay for damages which the plaintiff sustained on September 30, 1923, through an accident in which his left eye was injured and its sight ultimately destroyed.

There was a trial by jury, and at the close of plaintiff's evidence and again at the close of all the evidence the defendant asked for an instruction in its favor. These motions were denied and the jury returned a verdict of guilty, assessing plaintiff's damages at $183.93, for which amount the court entered judgment after overruling defendant's motions for a new trial and in arrest. The plaintiff has not appeared in this court to support the judgment, and after a careful consideration of the evidence we think the judgment must be reversed for the reason that, as a matter of law, he cannot recover.

The testimony of plaintiff is to the effect that on September 30, 1923, he got some sand in his eye while cleaning the boiler of an engine belonging to the Chicago, Milwaukee and St. Paul Railroad company, of which corporation plaintiff was an employe. The same eye had been injured about four years prior to that time by getting a chip or particle of steel in it. Defendant says that he removed the sand from his eye and continued to work

until October 6th thereafter, although during all that time the eye hurt him; that on October 6th he consulted an eye specialist employed by the Railroad company to take care of its employes. The specialist told him that the eye would have to be removed and he was sent to a hospital, where the operation was performed October 18th. He remained in the hospital twenty-four days. He admits that during this time neither he nor any one in his behalf communicated with or notified the defendant about the accident, but says that after he had left the hospital, which was after more than twenty days from the date of the injury, he told Mr. Root, the agent from whom he obtained his policy.

The policy contained the following provision:

> "4. Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In event of accidental death immediate notice thereof must be given to the Company. 5. Such notice given by or in behalf of the Insured or Beneficiary, as the case may be, to the Company at its General Offices, Accident and Health Department, Saginaw, Michigan, or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

There is no evidence in the record from which the jury could have found that it was not reasonably possible to have given notice, and it is uncontradicted that no notice was given within the time limited.

The cause was submitted to the jury by the court evidently upon the theory that two letters written by the defendant February 19, 1924, one addressed to the plaintiff and the other to his attorney, might, as a matter of fact, be held to amount to a waiver of notice. These letters in substance state that defendant denies its liability; that an investigation had disclosed that the trouble for which plaintiff claimed was in existence long prior to

the time when the policy was issued; that there was a misrepresentation in plaintiff's application in that, at the time he applied for the policy he had suffered a serious injury to his left eye, which fact was not revealed to defendant nor were other troubles of the eye with which he was suffering at that time revealed. The letters recite that plaintiff had already paid three claims upon this policy totaling $34.66, and in the letter to plaintiff was enclosed a check to plaintiff for the difference between this amount and a total amount of premiums which he had paid upon his policy. The letter to plaintiff concluded: "We must advise you that, for the above, as well as other good and sufficient reasons, this Company denies any and all liability under your claim."

We are unable to find anything in this letter which can be construed into a waiver, and we think it was clearly error for the court to submit the cause to the jury. The instruction for defendant should have been given. Weston v. State Mut. Life Assurance Co., 234 Ill. 498; Hensel v. Capital Live Stock Ins. Co., 219 Ill. App. 77; Knickerbocker Ins. Co. v. Gould, 86 Ill., 388.

For the reasons indicated the judgment must be reversed.

REVERSED.

McSurely, P. J., and Johnston, J., concur.

222 - 29630

SIMEON LOUTHENBACK, Being Business as S. LOUTHENBACK & COMPANY,

Appellee,

vs.

REINHOLD FREDRICH,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 641

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The statement of claim alleged that plaintiff was a duly licensed real estate broker in Chicago; that on July 15, 1921, (afterwards, upon the taking of evidence, amended to July 15, 1922) plaintiff was employed by defendant to procure a purchaser for the premises known as 6740 St. Lawrence avenue; that in the same month plaintiff procured one Sherman Huff to purchase the premises for a consideration of $8,500, but that, for the purpose of defrauding plaintiff of his commissions, defendant entered into a contract with the purchaser procured by plaintiff and sold the premises to him for $8,000, and has refused to pay plaintiff's reasonable commission, alleged to be the sum of $250.

The affidavit of merits denies that plaintiff is a duly licensed broker; denies that defendant employed plaintiff, or that he ever made any contract with plaintiff, either oral or written; denies that plaintiff procured one Huff as a purchaser for $8,500, or that defendant owned the property known as 6740 St. Lawrence avenue, or that he made a contract to sell the same for the purpose of defrauding plaintiff, or that he had been requested to pay plaintiff's just and reasonable commissions, although it was averred that, if he had paid all who asked him for commissions, nothing would be left out of the proceeds of the sale. In fact, defendant denied all the material averments

of the statement of claim.

The cause was tried by the court and there was (evidently with some hesitancy on the part of the court) a finding and judgment for plaintiff in the sum of $250. Plaintiff has not appeared in this court in support of the judgment.

The assignments of error question the sufficiency of the evidence.

The evidence shows without dispute that the defendant, Reinhold Fredrich, and his wife, Mary A. Fredrich, on January 1, 1922, were the owners of record of this property and that title stood in their names as joint tenants and not tenants in common, and that this property was sold about July 15, 1922, to Mr. and Mrs. Sherman Huff for $8,250.

The plaintiff called the defendant as a witness and he testified that he had not listed this property with any brokers; that he had never had a telephone conversation about it with a Mr. Jacob Kier, but that he did talk with a man named Isbell; that he did not know who Isbell was at the time he talked with him, and did not know that he was employed by plaintiff, Simon Loudenbeck. He says that he discussed the terms and conditions of sale with Isbell; that Isbell came to the house and wanted to know if the house was for sale, and that defendant told him it was; that he would sell for $8,500 net, meaning that he, Isbell, should get his commission over and above that price; that Isbell wanted to know whether he could bring a party in but did not mention the name of the party; that in the latter part of May or the beginning of June, 1920, he showed the place to the man Isbell brought, whose name he did not know; that he, defendant, wanted $8,500 net, and did not say that he would pay the regular real estate commission, and that Isbell did not say to him that he would have to pay commissions; that he found out later this party was Mr. Huff.

Simeon Loudenback, plaintiff, testified that he was in the real estate business since July, 1921; that he did not know the defendant, Reinhold Fredrich, nor the premises in question; that he had no personal knowledge that the property was listed in his office for sale.

Frank Isbell testified in substance that he had been in the real estate business for the past four years on and off; that in July, 1922, he was working in Mr' Loudenback's office; that he met defendant, Fredrich, in several business transactions involving the property; that he had a talk withhim in the presence of his wife, daughter and son, and Mr. and Mrs. Huff about February, 1922, at his, Fredrich's, building; that Fredrich said he would sell his building for $8,500; that he, Isbell, produced Mr. and Mrs. Sherman Huff, to whom the building was finally sold, and who were introduced to him by a Mr. Jefferson; that he introduced Mr. and Mrs. Huff to Fredrich at the Fredrich house; that they later said they would bring him down Liberty bonds and put up money the next day; that he later met Mrs. Huff on the street car, when she told him she had "done bought;" that she thought she could make a better deal by buying direct; that he thereupon wrote Mr. Fredrich two letters, which are not in evidence; that the witness talked with Mr. Fredrich on the 'phone on two different occasions, March 3, 1922, and March 15, 1922; that he later called and told Mr. Fredrich: "You understand, I introduced you to Mr. and Mrs. Huff and that they told me that you had sold them your building, and that they had bought it and put up earnest money. And I said, 'If you sell them that building you may expect to pay the commission as you agreed.' He says, 'I do not know about that.' Later I wrote him another letter." This letter is not, however, in evidence. Isbell says that he had a later conversation with defendant, Fredrich, at his, Fredrich's home, and asked him what he was going to do about the

commission.

On direct examination the witness said that he introduced Mr. Huff to the defendant, Fredrich, about twenty-five or thirty days prior to the sale of the building.

On cross-examination he stated that he first met Mrs. Huff in February, 1922, and never saw her prior to that time; that he did not know definitely where she lived; that he took Mrs. Huff with her husband out to Fredrich's place in a Yellow cab and introduced them to Mr. Fredrich; that he had a conference with Mr. and Mrs. Huff in the cab and told them the price was $8,500. The witness was asked whether it was not a fact that this trip which he said occurred in February, 1922, was the last of May or the first of June, 1920, to which he answered, "I don't think it was, I do not remember. I did not know Mrs. Huff in 1920." The witness further stated that he does not remember whether, at the time he went out to see Mr. Fredrich he told him that he was in the real estate business, and he denies that he ever told Mrs. Huff in the taxicab that the price of the place was $9,000.

Plaintiff, Simeon Loudenback, stated on cross-examination that a Mr. Kier started to work for him in 1919 or 1920, and that in 1921 he, plaintiff, purchased an office at 738 East 39th street, and put Kier in charge of it as manager; and that he continued throughout the entire year of 1922; that Isbell started to work for him in 1921 and was not working for him in the year 1920; that Mr. Fredrich did not list his property with the witness, and that the bill for commissions which was mailed by the 39th street office was made out on information furnished by Mr. Kier.

Jacob Kier testified that he ran Loudenback's office as manager and that Isbell worked under him as a salesman; that he had talked with defendant, Fredrich, over the telephone in February, 1922; had never talked to him before and did not know his

voice; that he called him on the 'phone and asked him if he could get a good deal with cash, if he would sell for $8,000, and Fredrich replied that he would take $8,500 for it with a small payment down and would pay commission on $8,500, and that in response to this conversation he sent Isbell to see the defendant; that he saw Isbell and the prospective purchaser at his office; that the system of listing property at their office was "to go out and list some property and get a buyer."

On behalf of the defendant Mrs. Huff testified that she had been living at 6740 St. Lawrence avenue for two years, moving there on May 6, 1922; that she first got acquainted with Mr. Fredrich the first of May or the first of June, 1920; that Mr. Isbell came to her and Mr. Huff and stated that he heard they wanted to buy property and that he would take them out to see a place; that he did not know the gentleman, but thought he could get them there; that he called a Yellow cab and took them out and they went to the Fredrich home where they found Mrs. Fredrich alone; that Mr. Fredrich came soon afterwards and showed them all through the place; that Mr. Isbell said to them, "You stand back now, and I will talk to him;" that Mr. Huff stood back but she did not and was within hearing distance; that he, Isbell, said to Fredrich, "How much do you want for this place?" and Mr. Fredrich said, "$8,500 net;" that Isbell said, "I can get you $9,000;" that Mr. Fredrich said, "That is what I want, $8,500 net, and that is my price;" that they came out and got in a taxicab and that Isbell asked her if she liked the place, to which she replied, "Very well," whereupon Isbell said, "It is $9,000;" that she said, "He said $8,500," to which Isbell replied, "I am a good talker, maybe I can get it for $8,500;" that she never saw Isbell any more; that he called up on the 'phone in 1921, in the early partof the year, but she never talked to him nor had any other

conversation with him, and that if he ever came to see her about the building afterwards she did not see him and never again had anything to do with him; that she finally bought the property from Mr. Fredrich and Mr. Huff put a deposit on it in February, 1922, and she identified the contract which is in evidence and corroborates her statement in this respect. The witness on cross-examination said that she did not remember meeting Loudenback at his office, does not know where 738 East 39th street is, and never heard of Loudenback or his office, nor did she know Mr. Kier or remember ever having seen either of them. She is positive that the first time she saw the property was the last of May or the first of June, 1920, and the only man that took her out was Isbell; that she afterwards went out there herself. She denied any conversations with defendant, Fredrich, with reference to the possibility of suit for real estate commissions.

The defendant, Fredrich, testifying in his own behalf says that he first saw Mr. Isbell and Mr. and Mrs. Huff about the latter part of May or the first part of June, 1920, at his place, 6740 St. Lawrence avenue; that Isbell asked him if the place was for sale, and that he told him that if he could get his price he would sell it; that he showed him the premises; that Isbell asked what he wanted for the building, and that he said $8,500 net; that he, Isbell, should get his commission wherever he could, anything over that; that he did not tell Isbell that he wanted him to get a purchaser, nor that he wanted him to act as a broker; that Isbell did not tell him that he, Isbell, was in the real estate business; that he does not recollect seeing Mr. Isbell again until after the bill was sent in 1922; that he never placed the property for sale in the hands of any broker; that he, from the time Isbell first saw him until he sold the property, did not have it listed with any real estate broker; that the Huffs

came back to him in 1922.

In view of the allegations of the statement of claim, and also in view of the fact that Mrs. Huff was a disinterested witness, as well as the other circumstances which appear in the recital just made, we think a clear preponderance of the evidence indicates that Mr. Isbell took the Huffs to see this property in 1921 instead of 1922, as the plaintiff, by his amended pleading, now alleges, and for the same reason we think there is a clear preponderance of the evidence to the effect that the understanding was that Isbell's commission in case a sale was made should be paid by the purchaser and not by the vendor. We also think that a preponderance of the evidence further indicates that plaintiff, through Isbell, had abandoned all efforts to sell the property, and that he is therefore not entitled to recover. It is clear that this sale was not effected through Isbell as the procuring cause. Bergman v. First S. B. & L. of Chicago, 169 Ill. App. 329; West End Dry Goods Store v. Baum, 133 Ill. App. 544; Watts v. Howard, 51 Ill. App. 243.

The judgment is therefore reversed, with a finding of facts.

JUDGMENT REVERSED WITH FINDING OF FACTS.

McSurely, P. J., and Johnston, J., concur.

FINDING OF FACTS.

We find as ultimate facts that the sale of property here involved was not effected through the efforts of appellee, plaintiff in the trial court, or through information derived from him, and that he was not the efficient or procuring cause of said sale.

234 - 29651

4388a

A. W. DOERRESTAD,
Appellee,

vs.

GERALD E. CHRISTOPHER, E. B. CHRISTOPHER and RICHARD B. CHRISTOPHER, Doing Business as CHRISTOPHER MOTOR CAR COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 641

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The appellants here were defendants below, and it appears from the abstract that plaintiff filed a statement of claim demanding damages in the sum of $1,000 on account of a series of false and fraudulent acts of the defendants by which he had suffered loss in the amount of over a thousand dollars.

The defendants filed an affidavit of merits which stated as a matter of defense that plaintiff's statement of claim did not state a cause of action in tort, but was merely an attempt to restate in assumpsit the portion of matters involved in a suit already pending in the court between the same parties, in which a judgment was entered in favor of the plaintiff and against the defendants in the sum of $133.30 and the balance continued for trial before a jury. Further that, if any tortious act was committed by the defendants or any of them by reason of any of the facts set forth in the plaintiff's statement of claim, said act was committed more than two years prior to the filing of the suit. The affidavit of merits also denied that defendant, Gerald E. Christopher, was a member of the partnership which was sued as the Christopher Motor Car Company.

The cause was tried by the jury, which returned a finding that the three defendants doing business as the Christopher Motor Car Company were guilty of having maliciously, wilfully and

intentionally and with intent to injure and defraud the plaintiff, converted to defendants' own use the property of the plaintiff as alleged in plaintiff's statement of claim, and assessed the damages at the sum of $1,000, and upon this verdict the court entered judgment, from which this appeal was prayed and allowed.

It does not appear that there was any motion for a new trial or in arrest of judgment, and the only errors assigned and argued are that the statement of claim does not allege facts constituting a cause of action or which would justify a verdict and judgment in trover, and that the verdict and judgment are in controversion of the law.

There is no bill of exceptions, stenographic report or statement of facts in the record, from which we can determine what the evidence in the case was. The presumption is that this evidence, if preserved, would sustain the verdict. We have no doubt that the statement of claim would have been stricken upon motion. It does not state in a coherent manner the facts constituting the cause of action for which plaintiff sues.

However, in the absence of the bill of exceptions and of any motion in arrest of judgment, the presumption must be in favor of the judgment, and as we understand it, under the settled practice of the Municipal court, we must presume - although the pleadings did not set forth the issues - that evidence was in fact heard which would justify the rendition of the judgment. It is not necessary to review the cases, but as we understand the law defendants cannot, on the record as recited, in this court, for the first time, attack the sufficiency of the statement of claim. Gramblodt v. S. Rys. Co., 139 Ill. App. 135; Sher v. Robinson, 23[illegible] Ill. App. 365; Thom v. Jackson, 231 Ill. App.358;

Lyons v. Kanter, 255 Ill. 336; McClun v. Gillespie, 227 Ill. App. 400; Shaw v. Robinson, 298 Ill., 181; Eunes v. Sander, 229 Ill. App. 592.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

243 - 29660

4391

DE FOREST BOWMAN,
Appellant,

vs.

ELBERT CLARK,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 641

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff from a judgment for costs entered in favor of the defendant upon the verdict of a jury.

The plaintiff sued as the assignee of a claim against defendant for the premium for one year on a life insurance policy for $10,000, which policy, it is alleged, the defendant received, accepted and retained.

The defendant admits that he received the policy but says that he was to have the opportunity of examining it before he assumed any obligation to pay the premium; that the policy was submitted to him for that purpose; that it was not as represented by the agent and not a policy suited to the defendant, and that he therefore returned the same to the plaintiff.

The uncontradicted evidence shows that the defendant made an application in writing for life insurance to the amount of $15,000, to be issued in two policies, one for $10,000 and the other for $5,000; that this written application was made on June 15, 1922; that the policies were left with him at his office on June 20, 1922, and that about ten days later he returned the policy for $5,000 and made certain corrections to his answers as the same appeared in the original application, by means of a written statement which he signed.

The agent for the Insurance company testified that a

few days thereafter he asked for the premium by 'phone, and that defendant said he would mail a check immediately and that he had several similar conversations with him during the sixty days following the date of the policy.

The defendant denies that he at any time told plaintiff he would give him a check, and says that plaintiff told him before he signed the application that there was no obligation to take the policy; that he could examine it and need not keep it. Defendant also denies the testimony for plaintiff to the effect that he was told that he had only sixty days in which to examine the policy, and denies that he ever told the agent that he would accept the policy or pay the premium.

The uncontradicted evidence shows, however, that this $10,000 policy was retained by defendant five months, and that he returned it to the agent of the company on November 13, 1922. Upon this record, as it appears, we would be disposed to hold, as a matter of law, that this was an unreasonable time. Certainly, if a buyer ordered goods which he kept for five months, he would be liable for the price under such circumstances, and much more do we think this would be true in a case where a life insurance policy, through which the company might, in the contingency of defendant's death, become liable for the sum of $10,000 is the subject matter of the contract.

We think the verdict of the jury was manifestly against the evidence, and a new trial should have been awarded. For the error indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

355 - 29772

4390

AUGUST GANZ,
Appellant,

vs.

VALENTINO HULF,
Appellee.

237 I.A. 641

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued in a statement of claim, charging that the defendant, on the 27th day of August, 1921, converted to his own use a certain Nash automobile, the property of plaintiff, which defendant had five days prior to that time sold and delivered to the plaintiff.

The defendant denied the prior sale of the automobile and denied the conversion of it. There was a trial by jury, a verdict of not guilty, motion for a new trial by plaintiff overruled, and judgment against plaintiff for costs.

The defendant has not appeared in this court and the argument by plaintiff is directed to the point that the court erred in instructions given to the jury.

Complaint is made that the court told the jury that the statement of claim charged fraud against the defendant, and that a verdict in such case must be based on a clear preponderance of the evidence. Again it is complained that the jury was told that, while a plaintiff might testify in his own behalf, it was for the jury to weigh his evidence remembering that he was interested in the result of the suit. It is further contended that the court erred in stating the form of verdict which should be returned in case the jury should find the defendant guilty. This form was as follows:

"We, the jury, find the defendant, _____, guilty of having maliciously and wilfully and intentionally with intent to injure and defraud the plaintiff converted to defendant's own use the goods and chattels of the plaintiff and assessed the plaintiff's damages at the sum of $_____."

The instruction as to the weight to be given to plaintiff's evidence (whether reversible or not) was without doubt, subject to criticism. Penn v. Veraten, 140 Ill. 637; North C. S. R. Co. v. Dudgeon, 83 Ill. App. 528.

It is, however, apparent from a consideration of the whole record (and he, plaintiff, does not contend the truth to be otherwise) that the jury was instructed orally and the record affirmatively shows that, after giving the instructions and immediately before giving the forms of verdict to the jury, the court asked counsel if there were any suggestions to offer, to which the reply was "No."

While, as plaintiff contends, this court cannot ordinarily take judicial notice of the rules of the Municipal Court, we think, irrespective of such rule, it is the general practice where the jury is instructed orally that a party desiring to assign error upon any instruction must object thereto before the jury retires.

Moreover, there is no merit to the contention that the form of verdict and instructions as to fraud were not applicable since, as a matter of fact, the evidence for plaintiff tended to show the larceny of the automobile by the defendant and plaintiff's case was tried upon that theory. The judgment is affirmed.

AFFIRMED.

McBurney, P. J., and Johnston, J., concur.

407 - 29824

43912

WILLIAM E. ROAN,
Appellee,

vs.

S. P. RAGLEN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 641

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff on trial by the court recovered judgment for $279, which defendant seeks to reverse.

There is little controversy as to material facts, which would seem to be as follows: Plaintiff was employed by the Standard Oil Company. He was also engaged in selling, on his own account, a contrivance known as the Standard Oil Burner, which was advertised by him as well adapted to the heating of buildings.

The distinctive feature of this contrivance was the use of oil instead of coal and other fuel.

The written advertising matter used by plaintiff described in somewhat lurid fashion the supposed benefits to be derived from the use of this oil burner. It said in part, "You are Protected by our Money Back Guarantee. You are to be the judge as to whether the burner is a success. We assume all risk. Order Your Standard Oil Burner Today -- and get real heating satisfaction -- Now." Defendant read and relied on the statements contained in this advertisement.

Negotiations were opened for the sale of one of these burners to defendant, and plaintiff came to defendant's home and inquired as to the number of rooms, etc.

February 16, 1924, defendant gave an order in writing which reads as follows: "Please install one No. 1000 Standard Oil

Burner with necessary tank and fittings, at 861 Winnetka Ave., Winnetka, for which I agree to pay you the sum of Three Hundred dollars ($300.00) as follows: $25.00 with order, balance on installation.

"It is understood that this installation will heat the above premises as per the published rating of the manufacturer of the heating plant now installed therein, and that if such results are not accomplished within 30 days after installation, you will refund, after notice in writing to you of such fact, the full amount paid by me. It is further understood, however, that as a condition precedent to such undertaking by you, that all conditions pertaining to my present heating plant shall be conducive to perfect heating, such as unclogged pipes, chimneys, freedom from water and air leaks, etc., and that if a contrary condition is present, I will take immediate steps to remedy the defects. Further, you are to have 30 days after favorable heating conditions are established in the present heating plant, in which to demonstrate the efficiency of the Standard Oil Burner equipment at first herein provided.

"Your acceptance of this order shall not become effective until your service department has approved the proposed installation."

The plaintiff in writing thereon accepted this order. A burner was put into defendant's house by plaintiff on February 22nd thereafter, and plaintiff says defendant came home before he, defendant, left, and, without examination of the plant, mentioned to plaintiff that defendant generally paid his bills on the first of the month and that he would mail plaintiff a check the next day, which was Saturday. On the following day, February 23rd, defendant mailed to plaintiff his check for $270 with a letter stating: "Find enclosed herewith my check for $270.00 being the balance of the contract price of the Oil

Burner furnished in my residence, 561 Winnetka avenue, Winnetka, Illinois, plus $4.00 for additional equipment."

The check was duly presented by plaintiff for payment which was refused for the reason that the maker had stopped payment.

February 28th defendant wrote plaintiff, saying: "I wish you would remove this outfit as it fails to heat the house as per the contract which I have made with you. I have had an engineer call at the house and he analyzes the situation as being impractical on account of the lack of proper draft which, in my estimation, cannot be remedied." Also on March 29, 1924, the defendant wrote plaintiff, again requesting that the heating plant be removed, and asking him to return the check.

Charles A. Holmes, a combustion heating engineer, a graduate of the Royal Politechnic College of Stockholm, Sweden, who had followed his profession for eighteen years, testified that he made an examination of the oil burner in question on February 24th. He says it was not heating the building properly; that the temperature which he took in the rooms was 64; and that the weather was mild that day. He says that a burner of that size was inadequate to heat defendant's building because it was not possible to get the proper amount of air or the amount of oil necessary to burn in order to heat it. The chimney was 8 X 10 and the chimney flue 55 feet high, and that only about 300 cubic feet of air could be got through the chimney every hour, while, as a matter of fact, "you should have 2000 to burn that amount of oil properly." He says the condition was not due to any defects in the pipes or chimneys; that there was no water or any leaks in any part of the building or apparatus; that, in his opinion, a burner the size of the one that was installed there at that time could never properly heat that build-

ing with oil. The testimony of Mr. Holmes is not, we think, met by any competent evidence introduced by the plaintiff.

The plaintiff tried his suit upon the theory that it was a suit upon the check which, his statement of claim averred, had been accepted in full payment of the indebtedness. He contends that the contract and the written advertising are wholly immaterial, and, as a matter of fact, upon the trial objected to the same being allowed in evidence.

Plaintiff says that, since the contract called for payment upon installation unless the check is regarded as payment, defendant is in default under the terms of the contract and was therefore in default under the terms of his contract, citing Harbor Brothers Co. v. The Moffat Cycle Co., 151 Ill. 84; Consumers Mutual Oil Co. v. Western Petroleum Co., 216 Ill. App. 382; Armstrong, etc. v. Continental Can Co., 220 Ill. App. 94. We are not, however, cited to any cases holding that the maker of the check would not have the right to stop payment on it after discovering that the goods for which the check was given were not as represented, and, in the absence of such authority, we hold that the maker of a check who has given it for the purchase price of goods may stop payment on the same upon learning that the goods are not as represented. A different rule would make possible all kinds of fraud and sharp practices.

The cases supra cited by plaintiff are against him, since the uncontradicted evidence shows that plaintiff did not install the kind of a burner that the agreement required. There is no proof tending to show that this burner would heat the premises "as per the published rating of the manufacturer of the heating plant which was installed;" a clear preponderance of the evidence indicates that it was impossible to properly heat the building

with the burner furnished. It was not a success, defendant "being the judge."

The court erred in finding for the plaintiff and in entering judgment, and the judgment will therefore be reversed and judgment of *nil capiat* here.

REVERSED AND JUDGMENT OF
NIL CAPIAT.

McNally, P. J., and Johnston, J., concur.

447 - 29864

CHARLES J. LANGE and JOSEPHA LANGE, doing business as LANGE and COMPANY, Appellees, vs. LOUIS BERNSTEIN and REBECCA BERNSTEIN, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 642

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of $375 entered upon the verdict of a jury.

The suit was for commissions alleged to be due to plaintiffs for their services in connection with the sale of a certain leasehold and furnishings belong to the defendants located at 4325-4327 Hazel avenue, in Chicago.

It is undisputed that the leasehold or "rooming house" was, prior to its sale, listed with various brokers and was on May 15, 1923, sold to Mrs. Ida Katz for the sum of $9,500, and further that the deal was actually closed through another real estate broker, Martha Muhlenfeld, with whom the property had also been listed by defendants.

The law is well settled that where a vender has his property for sale with several brokers (not giving to any one of them the exclusive agency) he is, in case of sale by one of these brokers, liable for commissions only to the one who is the efficient or procuring cause of the sale. It is so held in practically all the cases cited in the briefs of defendants as well as plaintiffs. Day v. Porter, 161 Ill. 235; McGuire v. Carlson, 61 Ill. App. 395; Holding v. Hennebery, 191 Ill. App. 368; Vreeland v. Vetterlein, 33 N. J. Law, 247.

These cases also hold that such a situation casts upon the vendor the duty of exercising good faith towards the broker, and that fraud, misconduct or fault on his part preventing the consummation of a sale which would otherwise be made may render him liable.

While these general propositions are well settled, nice questions often arise on particular facts as to whether a broker is or is not the procuring cause of a sale, and as to what is or what is not fault on the part of the vendor. Where the issue is one of fact, it is, of course, for the jury guided by proper instructions as to the law. Curran v. Sundell, 220 Ill. App. 584; Reed v. Young, 146 Ill. App. 210.

The points here argued by defendants go to the weight of the evidence which, it is claimed, was a matter of law insufficient to prove plaintiff's services were the procuring cause of the sale, and also insufficient to establish by a preponderance of the evidence that defendants were guilty of any wrongful conduct or that they failed to remain neutral as between the brokers.

The defendants, husband and wife, were the owners of the property sold, and the evidence for plaintiff tends to show that Mr. Bernstein visited the offices of plaintiff on three or four occasions with reference to a sale of this leasehold, and told plaintiffs to sell it at the price of $9,500; that Mr. Lange of plaintiff's firm took two or three people to see the property; that they took Mrs. Katz, who finally purchased it, to see it and showed her the lower part of the building; that Mrs. Bernstein was then present but her husband absent; that, after waiting an hour and three-quarters, Mr. L. and Mrs. K. left, having agreed to go again to see the property; and that, about a week or two later, Mrs. K. called plaintiff and said she would like to go over to Mr. Bernstein's place. Mr. L. asked her to postpone the matter

for a day or so as he was very busy, but she said, no, she wanted to take care of it "right away." The next he heard of the matter was that the property had been sold to Mrs. Katz. He told Mr. Bernstein he was not being treated fairly, and Mr. Bernstein said something about having paid the commission to the other party.

Mrs. Katz testifies that this visit with Mr. Lange to the premises took place on a Saturday and that, on the following Monday, he called her up and asked what she thought of the place, and that she said she would let him know when her husband came back from the hospital; that, after two weeks, she called up Mr. Lange to make an appointment to look at the place; that she told him she would come over to his place, and he would take her out again to see the property; that she went to Dearborn street and Superior street, where she met Martha Buhlenfeld whom she knew well and who told her that she, Martha, was in the real estate business. Mrs. Katz told her that she was going to Lange's to look at a place, and that Martha replied: "I get a better bargain than Lange has." The witness says that she told Martha that she had seen a place at 4328 Hazel avenue and liked it; that Martha said she had better places, and took the witness in the machine and showed her three more places; after which she, the witness, told her that she didn't like the places, that her day had been spoiled, and that she was interested in Hazel avenue. Miss Buhlenfeld then took her to Mr. Bernstein whom she had never seen before, and they went through the building where they saw Mrs. Bernstein who said that Mrs. Katz had been there "Saturday, two weeks ago with Lange."

The witness says: "Bernstein said to me, 'What is the difference from who you buy?' I said, 'Well, I knew Lange before and I want to go with Lange.' Bernstein asked me how

much money I have; I said I got $3,300 and Bernstein wanted $3,800 and I was about $500 short. I said I cannot leave a deposit, my husband is sick. * * I say I haven't got the money. She say she is going to lend me $500 to buy this place. I have $3,300, she say she will lend me $500, then I have $3,800 and Miss Muhlenfeld said you can pay me back $50 per month. I said, 'All right, Martha. If you lend me the $500 to buy the place I go and call up Mr. Katz.' * * * I paid $8,500 for the place. When I talked to Lange the last time, I was still considering buying the place. When I put up the deposit Mr. Bernstein told me, 'What is the difference to you, if Martha Muhlenfeld or Lange sell the place? It is no difference to you,' he say, and I say, 'Well if it is no difference to you, it is no difference to me.'"

On cross-examination, the witness said that she first heard of the place maybe a month before from Mr. Lange; that she liked the place then but was not ready to pay a deposit that same day; that she did not have enough cash to close the deal, and Lange told her he would give her $500 and that she said she would talk it over with her husband first; she was not ready to buy on that day.

The defendant, Louis Bernstein, says he did not know when Muhlenfeld came with Mrs. Katz; that Mrs. Katz had been there before; and that he had never heard of Mrs. Katz before; that, when Mrs. Katz came the first time with Muhlenfeld, she said nothing about having been there with Mr. Lange; that his wife did not tell him Mrs. Katz had been there or had waited for him; and that he did not know that Lange was trying to sell this property to Mrs. Katz. Mrs. Bernstein corroborates the testimony of her husband to the effect that she did not tell him that Mr. Lange and Mrs. Katz had been there to see the property, and

Miss Muhlenfeld also testified to that effect.

We think the jury might properly find from the evidence that plaintiffs were the efficient cause of this sale; in fact, the evidence indicates without dispute that Miss Muhlenfeld endeavored as best she could to dissuade Mrs. Katz from purchasing the property in which she had become interested through the efforts of plaintiffs. Mr. Bernstein does not specifically deny the conversation with Mrs. Katz in which he urged her to make the deal through Muhlenfeld rather than the plaintiffs. If this was true, he clearly did not remain neutral in the matter, as it was his duty to do. At any rate, we think the question of efficient cause as well as the question of his neutrality were issues of fact properly presented to the jury, and we are not able to say that the verdict is manifestly against the evidence. The judgment will therefore be affirmed.

AFFIRMED.

McCurely, P. J., and Johnston, J., concur.

456 - 29873

GRANT A. RITTER and
ALFRED BARSH, co-partners
doing business as Rex
Realty Company,
Appellees,

vs.

BERNARD A. ROONEY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

237 I.A. 642

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs in their statement of claim allege that defendant listed with them certain real estate promising to pay the usual commission if plaintiffs procured a purchaser for the property; that they procured the purchaser, showed him the property and advised defendant of the negotiations, and that defendant subsequently sold the property to this customer thereby becoming liable to pay the commission.

The affidavit of merits alleged that defendant did not give plaintiffs the exclusive agency to sell the real estate; that plaintiffs did not notify defendant that they had a purchaser for the property or the name of the prospective purchaser; and that plaintiffs were not the efficient cause in negotiating the sale; and that another broker negotiated it.

The cause was tried by the court and there was a finding and judgment for the plaintiffs in the sum of $430. The errors assigned and argued are that the court found for the plaintiff, denied a motion in arrest and entered judgment.

For plaintiffs, Grant A. Ritter testified that on about the 10th or 12th of April, 1923, he called defendant by telephone; that defendant had been in the office earlier in the day, and while, he, the witness, did not see him, he learned of it through Mr. Barfoot; that he told defendant he had a

buyer by the name of Mannebach for the property in question which had been listed with plaintiffs; that he had submitted the property to Mr. Mannebach at $200 a foot, which Mr. M. refused to accept, but made a counter-proposal; that the witness said he would get in touch with him and see whether it was possible to get together on price, to which defendant replied that was all right. The witness further said that about three days later he reported this conversation with defendant to Mannebach and afterwards talked to defendant and told him that Mr. Mannebach stuck to his price, but that he, the witness, would not give up and had good hopes and would get in touch with him again; that defendant refused to accept the offer.

The witness further testified that he did not show the property to Mr. Mannebach but told him the exact location and pointed it out through the window of the office about a block away; and that he saw him go to the property with some gentleman, but no member of the plaintiff's firm. The witness says: "Mr. Mooney stuck fast and said it was absolutely impossible for him to pay commissions out of $14,000." That some time afterwards, in the month of May, he learned that defendant had sold the property to Mr. Mannebach for $14,000. The witness says that he did not have the exclusive agency on the premises; that the property was listed at $200 a foot, $14,000 to be the net price.

Mr. Barfoot, a salesman for plaintiffs, testifies that defendant listed the property with him in plaintiff's office; and that nobody else was there at that time; that Mr. Mannebach came twice to their office and with a gentleman who accompanied him drove down and looked at the property. He says, "I showed him the vacant lot from a window at the office, pointed it out, and they talked about it between themselves."

The witness further says that he heard Mr. Ritter converse with Mr. Rooney about Mr. Hannebach's offer, and he fixes the date when Hannebach came to plaintiff's office at about the 10th or 13th of April. An exhibit was also offered in evidence showing the listing of the property by defendant at "Net, $14,000, cash now." Thereupon the plaintiffs rested their case and defendant moved for a finding in his behalf, which was overruled by the court.

The defendant then testified that he listed the property with several brokers on Cicero avenue in one day and that he probably listed it with plaintiffs, that he never called again at plaintiff's office after listing the property and never to his knowledge had a telephone conversation with Mr. Ritter; that Mr. Ritter never mentioned Mr. Hannebach and that no one from plaintiff's office told him that Mr. Hannebach was interested in the property; that he had known Mr. Hannebach for eighteen years; and that the first he knew that Mr. Hannebach was interested was when Mr. Simpson of Stanley S. Jones & Company laid a contract on his, defendant's, desk on the 18th of April; that there was a scrabble about commission and he did not sign the contract on that day but did so on the day following.

Mr. Hannebach testified that he went to the plaintiff's offices and that they mentioned Mr. Rooney's property to him but did not say that Mr. Rooney was the owner; that Mr. Rooney's name was not mentioned at any time; that he called twice the first day and once after that; that in the afternoon they told him about the Rooney property and that the gentlemen in the office said he would like to have the witness meet him, Mr. Rooney, in a few days; that a few days thereafter he dropped in and asked what they wanted for the corner and he thinks they said $200 a foot, to which he replied in substance that he would not pay that much

for it, but said, "I will see what I can do." That he did not go back; that he subsequently got in touch with Simpson; that he was looking for stores in that neighborhood for markets and that after renting a store from Simpson he asked him about property in that neighborhood; that, with others, he, Simpson, pointed out the Rooney corner which was vacant; that the witness told him what he would pay for it and that he replied that he would see what he could do; that this was about a week after his last talk with the plaintiffs; that he did not know Mr. Rooney owned the corner until after seeing the contract; that the witness signed the contract and then Simpson brought it back signed by Rooney; that he had never told any one that he would purchase the lot or to go ahead and close up the deal or anything to that effect; and that he did not remember any one from the plaintiffs' office calling him on the telephone and having a conversation about the matter.

On cross examination he says that no one had ever shown him the lot until plaintiffs called his attention to it; that he was not familiar with that particular neighborhood but was looking up trading locations; that Mr. Rooney's sign was on the lot but he did not notice it; that the lot was full of signs; that the witness believes Mr. Ritter gave him the price the first day in the afternoon, which was $300 a foot for 81 feet and that he told him it was too much money and that Mr. Ritter said it was worth it and gave him the general line of salesman's talk; that, when he called again, Mr. Ritter didn't tell him he had talked to Mr. Rooney but said he had taken it up with the owner and couldn't get it for any less money; that that was the last he heard from Ritter until some two months previous to the trial when he stopped in at the witness' place of business after he, the witness, had bought the property; that he paid $14,000 for the property.

Mr. Simpson testified that when Mr. Kannebach came to his office he was an absolute stranger; that he came in and asked the witness what he had in vacant property; that he said it was a nice corner but he wouldn't give over $14,000 for it; that he said nothing about having looked at the corner before and did not say that he knew the corner, as far as the witness remembers; that he gave the witness a check for $400; that he took the contract to Mr. Rooney on Sunday and Rooney signed it on Monday; that the witness' firm had had this property listed from April or May, 1922, but the sign was not on it; that he knew Mr. Rooney and had sold the property to him the year before.

The defendant contends that the law applicable to these facts is stated in the case of Day v. Porter, 161 Ill. 235, where the court held that an instruction which told the jury that, if they believed from the evidence that the defendant placed the property in the hands of the plaintiffs for sale and that the plaintiffs commenced negotiations with a party who subsequently purchased the property, nevertheless, the jury should find for the defendant unless they also believed from the evidence that the plaintiffs actually brought about a consummation of the sale or were prevented from so doing by the fraud, procurement or misconduct or fault on the part of the defendant. That rule of law was also held applicable in the cases of Friend v. G. H. I. Co., 147 Ill. App. 487; McMahon v. Carlson, 61 Ill. App. 395; Belding v. Hemmeberry, 181 Ill. App. 368, and many other cases which are cited in the briefs.

The plaintiffs do not question the rule of law as announced in these cases but contend that it is not applicable to the facts which appear here, asserting that Rigdon v. More, 226 Ill. 382 is controlling. We think, however, that the rule of law as contended for by defendant is applicable where property

as here is listed with various brokers, no one of whom is given an exclusive agency to sell it. That was not the case in Siddon v. More, supra, upon which the plaintiffs rely, since the evidence there tended to show that there was a contract or agreement between the owner of the property and the broker. In that case, the court says at page 386: "We can attribute no other effect or meaning to the language of Mr. Strong to the witness Peters than an admission on his part that he had a contract or understanding with plaintiff in error by which, if the property was purchased by the McCormicks, he would be liable to plaintiff in error for commissions in making the sale. The statement was plain and unequivocal that the deal for the property with the McCormicks belonged to the plaintiff in error and he would have to be protected in the commissions if that deal was consummated." On the uncontradicted evidence, we think that the court erred in finding for plaintiffs and entering judgment for them and in denying the motion in arrest of judgment.

The judgment is therefore reversed with judgment of nil capiat.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

McAurely, P. J., and Johnston, J., concur.

486 - 29903

ROY J. BARANSKI,
Appellee,

vs.

YELLOW CAB COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 642

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant in an action for personal injuries. The cause was submitted to a jury, which returned a verdict for plaintiff in the sum of $20,000, upon which the court, overruling motions for a new trial and in arrest, entered judgment. The declaration consisted of four counts, which charged that the defendant, through its servant, negligently and carelessly caused one of its cabs to be driven at a high and dangerous rate of speed; that the driver failed to keep the cab under control, negligently and carelessly drove it upon the left-hand or easterly side of the street, and generally negligence in the driving and operation of the cab.

The accident in question occurred in the early morning (between one and two o'clock a. m.) on September 28, 1921, at the intersection of North Clark street and West Lake street, the latter of which extends east and west and the former in a northern and southern direction, both being public streets in the down town district of Chicago.

The plaintiff at this time was the assistant steward at the Randolph hotel (formerly known as the Bismarck) and at the conclusion of his work there had passed over to the north side of West Lake street for the purpose of taking the westbound car to his home. It had not arrived, and West Lake street at the intersection of Wells street was dark. He therefore walked east on the north side of West Lake street and proceeded across Clark street

on the north crosswalk, continuing until he was about eight feet from the east curb. He had, in the meantime, noticed (the street being well lighted at this place) that the westbound car was standing at its regular stopping place with its front end about opposite the east building line of Clark street. About the same time the car started up slowly. One of the posts which supports the elevated structure at this place stood about three feet north of the track the car was on. Plaintiff says he started toward the car, and that the middle of the car reached the post about the time he did; that he stopped there, intending to board the car at the rear end. As it approached he took hold of the handle-bars and was in the act of boarding the car (a preponderance of the evidence indicates with one foot on and the other off the platform) when he was struck by defendant's taxicab, which, coming from the north towards the south, swerved in an easterly direction. The lower part of his left limb was shattered.

The jury evidently believed (as a preponderance of the evidence indicates) that the accident occurred by reason of the fact that defendant's cab was being driven at a reckless and dangerous rate of speed; that the driver was negligent and failed to see the approaching car; and that when the collision was imminent, he attempted to swerve to the left of the car, thus landing on the wrong side of the street.

The driver of the cab gave an improbable account to the effect that, as the car was moving, the defendant ran from the northwest corner of the intersection in an attempt to board it; that in so doing he came between the cab and the street car, thus making it necessary for the driver to turn to the left in order to prevent striking him.

It is urged that there was error in the rulings of the court on the presentation of evidence. The substance of the

particular charge in this respect is that, under color of an attempt to impeach the testimony of Mr. Sage, the driver of the cab, plaintiff's lawyer succeeded in impressing upon the minds of the jurors that the brakes upon the cab were defective, thus injecting that issue into the case, although there was no allegation in the declaration of neglect on the part of defendant with respect to the equipment of the cab in this or any other particular. Under the allegations of the several counts of the declaration, evidence as to improper equipment of the cab was not admissible to establish direct liability on that ground. The plaintiff could not, of course, properly be allowed to present evidence tending to show a cause of action distinct and separate from that which was averred in his declaration, and a charge of liability for failure to properly equip the cab with brakes would amount to an averment of such distinct cause of action. C. B. & Q. R. R. Co. v. Hagen, 6[illegible] Ill. 329; T. W. & W. Ry. Co. v. Foss, 88 Ill. 551.

It is undoubtedly the law that, where an attorney by subterfuge succeeds in getting before a jury immaterial matter which is evidently prejudicial, and the court can see that injury must have resulted, a judgment thus obtained will be set aside. C. C. Ry. Co. v. Gregory, 281 Ill. 591; Chicago and State Line Ry. Co. v. Klein, 220 Ill. 334.

It is also true, as the defendant contends, that a proper ruling by the court will not always prevent a reversal for conduct of this sort. Wabash Ry. Co. v. Billings, 212 Ill. 37; C. U. T. Co. v. Lauth, 216 Ill. 176.

The plaintiff, however, contends that, if the matter thus brought out was not admissible under any of the counts, nevertheless the questions were proper as laying the basis for the impeachment of the witness; a witness may not, however, be

impeached on an immaterial matter. People v. Decker, 318 Ill. 234; People v. Israel, 369 Ill. 284; Cairns v. Campbell, 156 Ill. App. 415; Stewart v. I. C. R. R. Co., 184 Ill. App. 412.

The defendant also points out that, as the matter was immaterial, its attorney did not go into it upon the direct examination of the witness, and as the evidence was brought out upon cross-examination, it was in effect affirmative evidence offered by the plaintiff. Girdzus v. Vawitten, 211 Ill. App. 524; C. & E. I. R. R. Co. v. Stewart, 184 Ill. App. 37; Dalton v. People, 224 Ill. 332.

Plausible as these contentions are, we do not think they can be sustained for the reason that there were material issues in the case (irrespective of any charge of defects in the equipment of the cab) to which the evidence brought out with reference to the condition of the brakes was pertinent and material. One of these issues was whether the plaintiff was guilty of contributory negligence. In the course of his direct evidence the driver testified: "As I started to cross, why the car started up and got about half way across the crossing, with the rear end just about on the Clark street tracks, and I turned a little to the east to come around back of the car and as I did that I seen this man run from the northwest corner and get on the car, and I didn't want to run right into the back of the car, so I put on the brakes and by doing that brought the rear of the car right around into the car. *** If I had not put on my brakes and had not turned to the east, but had continued in my direction, I would have come right into the man when he was running."

On cross-examination this witness further testified: "It was the man that caused me to skid. ** My brakes were good. *** I did not have to apply my brakes to keep from hitting the car. *** I would not need to put on my brake at all to dodge

the car." The purpose of this evidence was to show that the plaintiff was guilty of contributory negligence. As indicating the exact situation at that time, it was proper and pertinent for either party to show that the brakes on the cab were or were not in proper condition.

An investigator for plaintiff's attorney, one Roa, testified that in an interview after the accident Sage said that if the brakes on the cab had been in good working order, the accident would not have occurred. This is complained of.

One count of the declaration charged negligence in that the defendant failed to keep its cab in control, and there was also a general charge of negligence as to the manner of its operation. In view of the issues raised by these pleadings, the condition of the brakes upon the cab would not be immaterial in determining the question of negligence in these respects.

The plaintiff gave evidence tending to show negligence in the speed at which the cab was driven in view of the condition of the streets and all other circumstances. It will hardly, we think, be contended that the driver of a cab who knows that his brakes are defective ought not to take that into consideration in determining the rate of speed at which he should drive, as well as in other matters demanding care in the manner of his driving. Evidence as to the condition of the brakes was not admissible to show negligence in the matter of equipment. It was, however, admissible for other purposes. Moreover, objections made to the testimony were sustained, and if the defendant was of the opinion that the jury was likely to be in any way misled into thinking that the question of the condition of the brakes was one from which negligence might be directly inferred, that matter could and should have been covered by a proper instruction to the jury. Toledo, St. L. & K. C. R. R. Co. v. Bailey, 145 Ill.

159. Such instruction was, however, not requested. We think there was no reversible error in this respect.

The defendant contends, however, that the court erred in giving, at the request of the plaintiff, instruction No. 18, which is as follows:

> "If you believe from a preponderance of the evidence that defendant was guilty of negligence in causing or permitting its taxicab to collide with the street car, and that plaintiff was thereby injured as alleged in the declaration, then, even if you believe from the evidence that plaintiff was guilty of negligence in or about boarding and attempting to board the street car, yet such negligence, if any, upon his part is not a bar to this suit, unless it was a proximate cause of plaintiff's injury; and it was not a proximate cause of his injury, if you believe from a preponderance of the evidence that it was not a natural and probable cause of his injury, and if you further believe from a preponderance of the evidence that it was not of such a character as an ordinarily prudent person ought to have foreseen might probably result in his injury; and that if his negligence, if any, did nothing more than furnish a condition by which his injury was made possible by the intervention of defendant's negligence, if any; and that an ordinarily prudent person could not have reasonably foreseen or anticipated such negligence as defendant's, if any there was."

In discussing this instruction the defendant assumes that it directs a verdict. It does not. It states in effect that, although the jury should find that the plaintiff was guilty of negligence, this negligence would not bar his right of action (in case the jury believed such right of action had been proved) unless the negligence of plaintiff was a proximate cause of the injury of which he complained. The instruction also proceeds to define the meaning of proximate cause (which it was quite necessary to do if the jury was not to be confused), but there is nothing in it which directs a verdict either in form or in substance. That the doctrine of proximate cause should be defined for the benefit of the jury has been held in Swift & Co. v. Hummard, 123 Ill. App. 186. Defendant says that the instruction is involved, argumentative, and misleading. It may be subject to some criticism in these

respect, although we think not more so than other instructions which were given in the case at the request of the defendant. The defendant says that contributory negligence in any degree by a plaintiff will bar his right to recover in this State, citing the well known cases of Krieger v. A. E. & S. R. R. Co., 242 Ill. 544; and Bushman v. Cal. & S. C. Ry. Co., 214 Ill. App. 435. This is true but not quite accurate, for the negligence in any degree which will bar such an action must also be negligence which is the proximate cause of the injury.

It is said that the first clause in the instruction is indefinite and that it is impossible to determine therefrom whether the negligence referred to in that clause is negligence charged in the declaration or negligence which may have appeared only in the testimony. This part of the instruction, however, is plainly introductory, and it is difficult to see how the jury could have been thereby misled. The statute provides for a certain degree of intelligence on the part of those who serve as jurors, and Appellate tribunals must presume that this degree of intelligence is possessed by the jurors who have passed upon cases which may become subject to review.

The defendant further argues that the several clauses in the last part of the instruction beginning with "and" would each have been understood by the jury as being the equivalent of "or" and that the effect of the instruction therefore was to tell the jury that the negligence of plaintiff, if any, was not the proximate cause of his injury, if the jury believed that it was not a natural and probable cause of his injury, or if the jury believed that it was not of such a character as an ordinarily prudent person ought to have foreseen might probably result, or if the plaintiff's negligence, if any, did nothing more than furnish a condition by which his injury was made possible by the

intervention of defendant's negligence, or if an ordinarily prudent person could not have reasonably foreseen or anticipated such negligence as defendant's, if any there was.

While courts, guided by the context and compelled by consideration of the whole of a given document or statute, will often construe "and" as the equivalent of "or," it is highly improbable that the average juryman would enter into such refinements of reasoning. There is no reversible error in the instruction.

It is next contended by defendant that the verdict of the jury was so large as to indicate passion and prejudice, and that the judgment should for that reason be set aside.

The medical testimony in the case was given by a physician who had cared for the plaintiff since the time of his injuries, and it is not contradicted by other testimony of a similar character. No medical witnesses were offered by the defendant. Nearly three years had elapsed from the date of the injury up to the time of the trial. The attending physician describes the injury which plaintiff received as "a crushing injury of the left leg, *** a compound fracture of both bones of the legs." He also says that it was a comminuted fracture, which means that the bones were broken into a number of fragments. He said, "The lower part of the fracture was split into several pieces and split right down into the joint; there was also an injury to the astragulas, the bone upon which the tibia articulates, so that that bone is practically destroyed and the ankle joint." He also testified: "This was an extensive injury; there was an extensive injury to the soft parts, that is the skin and underlying tissues were torn and crushed in a very extensive way. The posterior tibial artery and vein were lacerated and open. They are important; they are the two main arteries of the leg. In the beginning, the leg

from about two inches below the patella to the ankle, the tissues were entirely destroyed, with the exception of a small strip back here of skin. We replaced by stretching the skin the entire circumference of the leg, with the exception of about three inches of the posterior and outer aspect of the leg. The soft tissues were destroyed, they slough off, dead, deprived of circulation, for there was a wound nearly the entire circumference of the leg, that all the soft tissues were gone, the muscles were partially destroyed; tendons and nerves were torn, the skin was entirely gone. When I speak of soft tissues, I mean everything but the bone, muscles, nerves, and the whole thing. *** The muscles were torn; we took off about half of the muscles of the leg at the first operation, an operation that is called debridement, took away the dead tissue and restored the nerves. The posterior nerve was cut and we restored that. We ligated the vessels and removed fragments of bone. The muscles that were removed or destroyed have not been replaced." The doctor details at length the treatment which had been applied, which we do not think it necessary to describe in detail.

Upon trial the plaintiff asked that the plaintiff's leg might be shown to the jury, but defendant objected and the objection was, we think, properly sustained.

We think the evidence shows without contradiction that the strength and the use of the leg are permanently impaired. The plaintiff, since the time of the accident has been to the hospital for treatment of his limb on four different occasions. He has received 142 dressings at the doctor's office, and the physician was at the time of the trial dressing the plaintiff's leg about twice a week. Plaintiff used a cane in walking from July 1, 1922, to the time of the trial. The evidence shows without contradiction the fair and reasonable charge for the services of the physician up to the time of the trial was $1,500; that there was a hospital

charge of $650. What such charges may amount to in the future is, of course, speculative.

The evidence also shows that, from the time of the injury up to the time of the trial, the plaintiff had lost in salary as compared with his former earnings a total of $2,385, so that doctors and hospital bills and loss in earnings up to the date of trial amounted to the total sum of $4,535. Pain and suffering too must be considered. We are aware that cases like this appeal very strongly to the sympathies of the jury, and that it is the duty of courts of review to carefully scan and weigh the evidence bearing upon the subject of damages allowed. We also, however, may not be unmindful of the fact that the purchasing power of the dollar has very much decreased in the past decade. While this judgment is large, we cannot say that it is so unreasonable that it would be our duty as a reviewing court to set it aside.

There is no reversible error in the record, and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

18 - 28851

HIBERNIAN BANKING ASSOCIATION,

vs.

CHICAGO TITLE & TRUST COMPANY, et al

On appeal of ARTHUR R. JONES,

Appellant,

vs.

FRANK M. McKEY, Receiver,

Appellee.

237 I.A. 642

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Frank M. McKey was appointed receiver in a foreclosure proceeding, took possession of the property, February 1, 1918, and continued in the management of it until December 11, 1920, at which date the owner of the master's certificate, the property having been sold in the foreclosure proceeding, became entitled to a deed. On January 4, 1921, the receiver in compliance with an order of court theretofore entered, filed his final report and account, to which objections were filed by Arthur R. Jones who was given a second lien, for more than $100,000.00, on the premises by the decree rendered in the foreclosure proceeding, all of which was unpaid, since the property sold by the master brought only the amount of the first mortgage, viz. $519,166.12. The objections filed by Jones were principally to the amount of fees claimed by the receiver. A few items of disbursements, made by the receiver, were also objected to. The receiver's report and objections thereto were referred to a master in chancery, who took the evidence and made

Opinion filed April 29, 1926.

up his report, to which both the receiver and Jones filed objections which were overruled. The matter came on for hearing before the chancellor and the report of the master was in some respects sustained and in others overruled, and Jones being dissatisfied prosecutes this appeal from the order entered by the chancellor.

The properties involved, were known as the Springer buildings, one of which was known as Nos. 308-18 South Canal Street and the other, located immediately west of the first building, Nos. 309-19 Clinton Street, Chicago. Both buildings were eight stories in height, located between Jackson and Van Buren streets, in a manufacturing district and were used for light manufacturing, printing and similar business purposes. There were about 270,000 square feet of rentable space which, at the time the receiver surrendered the premises on December 11, 1920, was entirely occupied by about seventy-five tenants.

During the time the receiver was in possession he collected gross rentals of about $276,000.00. The receiver withdrew from the rents collected certain sums which he applied on account of his fees. These sums were based on commissions of 5 percent on thegross rentals from the time the receiver took possession of the premises February 1, 1918, until December 1919, and thereafter at 6 percent. The total amount thus drawn by the receiver and applied on his fees at these rates aggregated $14,915.17. In addition to this the receiver withdrew $8169.70 "for commissions on leases", making a total of $23,085.45, and in his final report and account, he asked that he he allowed an additional sum of $15,000.00, making a total of $38,085.45,

the report, to which both the receiver and their employer claim sole credit. The matter came to the notice of the Patent Office the following day the report of the Patent Office company relations and it became essential, the Patent Office financially remunerate this report from the Patent Office the commission.

The proposition involved, were known as the Designer building, and at which was known as Nos. 308-12 Bank Street and the other, located immediately west of the first building, Nos. 308-12 Clinton Street, Chicago. Both buildings were eight storeys in height, located between Jackson and Van Buren streets, in a manufacturing district and were used for light manufacturing, printing and similar business purposes. There were about 270,000 cubic feet of rentable space which, at the time the receiver surrendered the premises on December 11, 1920, was entirely occupied by about twenty-five tenants.

During the time the receiver was in possession he collected gross rentals of about [illegible]. The receiver with-drew from the funds collected certain sums which he applied on account of his fees. These sums were based on computations of a percent on the gross rentals from the time the receiver took possession of the premises February 1, 1920, until December 1921, [illegible] at 6 percent. The total amount thus drawn by the receiver and applied on his fees at these rates aggregate-ed $14,310.17. In addition to this the receiver withdrew $1250.00 "for contingencies or losses", making a total of $15,560.17, and in his final account and accounts, he asked that he be allowed an additional sum of $12,000.00, making a total of $28,000.00,

which he was asking the court to award him for all the services which he had rendered during the time he was in possession and control of the premises. During the period, two years and eleven months, which the receiver managed the property, he necessarily made a great many disbursements, all of which, as well as the withdrawal of fees and commissions, were without any order of court. The particular disbursements, which were objected to by Jones, are as follows:

1. Salary paid to F. D. Taylor, who was employed by the receiver and who acted under the receiver as Superintendent of Buildings..... $8009.50

2. Fee paid to Charles F. Schiller for having the valuation made by the taxing bodies reduced which resulted in a saving of taxes, of.. 640.00

3. Fee paid to Mortimer Scanlan for having the sale of the property as advertised by the County Collector for non-payment of taxes continued..... 25.00

4. Insurance commission paid to H.R. Axelson..... 1021.00

5. Payment made to H. R. Axelson for adjusting fire loss..... 150.00

6. Amount paid for stenographic services..... 38.25

7. An item which the receiver withdrew as an investment for the estate..... 3500.00

8. Fees claimed by the receiver.....

After hearing the evidence, the master made up his report and recommended that the receiver be allowed the 5 percent on gross rentals up to December 1919, and 6 percent thereafter, aggregating a total of $14,915.75, being the customary commissions that were charged, as shown by the evidence, by real estate agents in Chicago for managing, negotiating leases and collecting rents on property similar to the property in question. The master found that the receiver

necessarily performed services in addition to those ordinarily performed by real estate men in Chicago handling similar properties; that the evidence failed to show the amount of time expended by the receiver in the performance of such additional duties, the receiver not having kept a record of such time, apparently for the reason that he was unable to do so since he was acting as receiver and trustee in approximately two hundred other estates. The master, however, stated that such additional services were reasonably worth from $5,000.00 to $10,000.00 and recommended an allowance of $5,000.00, making a total allowance as recommended by the master of $19,315.75. He recommended that the charge of $2169.70 made by the receiver for commissions in negotiating leases be disallowed.

1. The master found that F. D. Taylor, who had been paid by the receiver $6009.50 had been employed by the owners of the building several years prior to the time the receiver took possession; that Taylor was at the premises during working hours, under the supervision and direction of the receiver, looking after details connected with and furnishing proper service to the tenants; that the objector, Arthur R. Jones, had been manager of the buildings for the owners prior to the time the receiver went into possession and he employed Taylor who rendered services for the receiver substantially the same as those he had rendered Jones; that Jones knew that Taylor was being employed by the receiver on a monthly salary and was being paid out of the receivership funds and that this payment was known by Jones to be in addition to the monthly commission retained by the receiver for his own services. The master recommended that the re-

ceiver be credited for the amount he had paid Taylor.

2. The evidence discloses that Charles E. Schiller was a lawyer and had been handling tax matters where it was thought property had been over valued for assessment purposes; that he was employed by the receiver, appeared before the assessing bodies and succeeded in having the valuation of the property reduced so that there was a considerable saving of taxes. The master recommended that the amount paid him by the receiver be allowed.

3. The record also discloses that Scanlan procured a continuance of the sale of the property for non-payment of taxes, at the request of the receiver, and that this was an advantage to the estate, and recommended that the receiver be credited for this item.

4. The evidence discloses that the receiver, in addition to acting as receiver and trustee of estates, was engaged in the realestate business with his brother and to some extent with Axelson, who was a licensed insurance broker; that Axelson at the request of the receiver procured insurance agents to cover the property with insurance for which the insurance agents paid Axelson from time to time commissions aggregating $1021.00; that in payment of these commissions, the agents from time to time gave Axelson their checks, which Axelson endorsed and they were deposited in the receiver's real estate business. Axelson was employed in the real estate business by the receiver and his brother on a salary and certain commissions.

5. There was a small fire in the premises and

the receiver employed Axelson to adjust the matter and the latter did so and was given in payment thereof the receiver's check of $150.00. This check was endorsed by Axelson and also deposited in the account of the real estate business.

6. The master found that the receiver had paid, a stenographer employed by him on a weekly salary, for certain stenographic work for the receiver in connection with the premises $38.35, for which the receiver gave his check. This was endorsed by the stenographer and also deposited to the account of the real estate firm. The master found that under the law the receiver was not entitled to make any profit in connection with these three items, even though the receiver had not intended to accomplish indirectly what he could not do directly and recommended that the three sums be turned into the estate.

7. It was admitted, the master found, that on August 25, 1919, the receiver withdrew from the estate $3500.00 which he claimed he intended to invest for the benefit of the estate; that no order of court was obtained for the withdrawal, no voucher made, although the evidence shows that vouchers had been taken for all other payments; that no entry of this withdrawal was shown on the receivers report, although it was entered upon his books; that the $3500.00 was returned by the receiver about the time he was ruled to file his final account; that $2300.00 of this sum was used by the receiver to pay for a mortgage on property in which the receiver's brother was interested and the remaining $1200.00 was used personally by the receiver. The

master found that his withdrawal was not proper and recommended that the receiver be charged with interest on the $2300.00 at 6 per cent, the rate which the mortgage bore and that he be charged 5 percent on the balance during the time it was withheld from the estate.

The master recommended that the receiver file an amended report in conformity with his findings and that he be allowed in addition to the sums above mentioned $4457.50 to be paid to the receiver's counsel for the services rendered by such counsel in preparing the receiver's final report and account, and in representing the receiver before the master at the several hearings. The master's fees were fixed at $2182.50, which, together with the sum $1287.75 for services rendered by a court reporter on the hearing before the master, was paid by the receiver. On the hearing before the chancellor the report of the master was approved in all things, except that the compensation of the receiver was fixed at $7500.00 per year or a total of $21,562.50. There was an allowance made by the chancellor of $500.00 in payment of the services rendered by counsel for the receiver which were necessarily rendered after the hearing before the master.

Counsel for the objector contends that the receiver was guilty of such breach of trust in the conduct of his receivership, that he should be denied all compensation. He further takes the position that if this contention be not sustained, then the receiver would be entitled to a commission of 5 percent on the gross rentals collected by him up to December 1919, and 6 percent thereafter in full for his com-

missions; that the undisputed evidence is that these rates were the rates fixed by the Chicago Real Estate Board for services such as were performed by the receiver; and were the usual and customary rates charged by real estate brokers for services similar to those rendered by the receiver; that it is the law that the compensation allowed a receiver should not be greater than would be his compensation for doing the same amount and character of work when employed by an individual. We think that the latter contention must be sustained. We see no reason why a person who is acting as a receiver and managing property involved in a foreclosure proceeding should be paid more than would be paid by private individuals for similar services. In the instant case the receiver testified in detail and at considerable length, as to the services rendered by him in the management of the property. The evidence also shows the services rendered by Taylor who was employed by the receiver as superintendent of the buildings. There was no evidence as to what such services as were rendered by the receiver were reasonably worth, except that given by real estate men called by the objector. They were Leo G. Varty, Earnest H. Dillon and James A. Hool.

Leo G. Varity testified that he had been a real estate operator in Chicago for twenty years and was connected with the firm of J. H. McGill & Co. who made a specialty of handling business and manufacturing properties; that that company handled the Columbus Memorial, Venetian, Coco-Cola and Sharples Buildings; that the latter was located at Washington and Jefferson Streets; that the usual and reasonable

rates charged by real estate brokers in Chicago for handling manufacturing and business properties in or near the loop, during the years 1918, 1919 and 1920, was 5 percent; that such services included negotiating leases, renting space, collecting rents, buying supplies, hiring and paying employes, the paying of bills for repairs and supplies for the building, taking care of any complaints made by the Health Department in regard to water, smoke nuisance and garbage, and that where there was a superintendent employed, he would be paid by the real estate firm out of the 5 percent commission.

Earnest H. Dillon testified that he was a real estate broker connected with the firm of Willoughby & Co. who made a specialty of handling loop property; that the usual, reasonable and customary rate charged for managing business and light manufacturing property situated in or near the loop during the years in question, was 5 percent, and afterwards raised to 6 percent; that services rendered in this connection would be collecting rents, negotiating and re-newing leases, looking after the taxes, insurance, making reports and everything in connection with the handling of the property, including complaints made by the Water and Health Departments of the City of Chicago, and that in case they employed a superintendent, he would be paid out of the 5 percent by the broker handling the building.

James A. Hool testified that he was a building manager and real estate dealer and a member of the Real Estate Board for seven years; that he specialized in the management of office, manufacturing and business properties; that he was

familiar with the buildings in question, having known them for thirteen or fourteen years; that the usual reasonable and customary rate charged by real estate men for collecting rents, negotiating leases and the management of what is known as light manufacturing property situated as the buildings in question is four to five percent of the gross income; that such service would include the collection of rents, rendering statements, making and renewing leases, hiring and discharging of employes, purchasing of supplies, placing of insurance, taking care of taxes, and everything pertaining to the management, care and upkeep of the property, including complaints made by the Health and Smoke Departments of the City of Chicago; that where the gross income of the building exceeded $100,000.00, they place a man at the building permanently and paid him out of their commissions.

The receiver called one Fred McGuire, who testified that he was manager of the Webster Building, located in the loop in Chicago; that he was a beal estate broker and had been engaged in that business for about twelve years; that he was familiar in a general way with the buildings in question; that practically all buildings in the loop have superintendents; that he had been connected with the Leiter Estate, having something to do with all of the properties of that estate, and they had charge of the Standard Trust & Savings Bank Building at Monroe and Clark Streets and was manager of that building for two years; that he had been the buildings in question probably three or four times in the last five years; that in his opinion it would be necessary in the management of the buildings in question to have a superintendent in

charge. He was then asked by counsel for the receiver: "Q. What is the usual and customary compensation of superintendents of buildings in the City of Chicago of the class and character of the Springer building, during the years 1918, 1919 and 1920?" Objection to this question was sustained. Apparently on the ground that the amount paid the superintendent in question was not complained of, the only complaint being whether it should be paid out of the charge made by the receiver or out of the estate in addition to the receiver's charge. Counsel for the receiver then stated "They (the objector) specifically stated that the services were reasonably worth the amount charged, therefore, the only question is whether the receiver should be charged with that amount." The Master said, "Yes". Counsel for the Receiver then said, "That is all". This witness was not asked by any one what the usual, reasonable and customary charge was for handling buildings by real estate brokers similar to the buildings in question nor was he asked whether a building superintendent was customarily paid by the real estate broker having charge of the property in addition to the charge made by the broker. So that it appears from the record that the only evidence before the court as to the usual, reasonable and customary charge made by real estate brokers in managing property similar to that in question is that given by witnesses, Varty, Dillon and Hool who placed it at from four to five percent. Of course the court might also take into consideration the personal knowledge of the value of the services rendered by the receiver, but this ought not to be contrary to the testimony of the witnesses, nothing appearing to cast any doubt upon the truthfulness of their testimony. In this state of the

record, we think the chancellor was not warranted in making an allowance for the receiver as compensation for his services at $7500.00 per year. Nor do we think the evidence warrants the allowance of $6009.50 which was paid by the receiver to Taylor who was employed by the receiver as superintendent of the buildings. The evidence showing, without contradiction, that where private real estate brokers handle similar buildings such compensation is paid by the real estate broker out of the commissions he receives.

The finding of the master to the effect that Taylor had been rendering similar services under Jones when Jones had charge of the buildings for Mrs. Springer, and that during the time the receiver was in possession, Jones knew that the receiver was paying him out of the funds of the estate in addition to the amounts withdrawn by the receiver for his own services, is not borne out by the record. The evidence shows that Taylor was first employed at the buildings by the receiver when he took possession February 1, 1918, and there is no evidence in the record that tends to show that Jones knew that Taylor was being paid for his services by the receiver and that the estate was being charged for this in addition to the regular commissions which the receiver was charging and indeed no such argument is made by counsel for the receiver. It is true that Jones received statements from the receiver from time to time showing total receipts and disbursements, but no items were given.

We think the receiver ought not to be deprived of all compensation for his services, as counsel for the objector contend, but that he should be allowed the amount recommended

by the master, viz. $19,915.75, being 5 percent on the gross rentals to December, 1919 and 6 percent thereafter, together with $5,000.00 for additional services rendered by the receiver which would not ordinarily be rendered by real estate brokers handling the property, because the evidence discloses that the receiver had numerous conferences with various parties in connection with the management of the property that ordinarily would not be required of managers of property not in litigation, and a great many of these were with the objector Jones at the latter's request. The evidence discloses that the receiver at the request of Jones from time to time rendered statements as to the receipts and disbursements in connection with the property, which services were outside of the work usually performed by a receiver and, since Jones is the only objector, the receiver ought to be paid out of the funds in his hands for this work. Moreover, we might add that the allowance of 5 percent on the gross rentals up to December, 1919, and 6 percent thereafter, is further justified by the fact that the receiver himself stated to Jones in response to a suggestion made by Jones that he continue to handle the property after the expiration of his receivership and that he would do so at the rate of 6 per cent of the gross rentals.

We think the recommendation of the master as to the other items in question, which recommendations were approved by the chancellor should be sustained and the receiver given credit accordingly, except as to the payment of the $3189.50 to the master and the $1287.50 paid to the court reporter on thehearing before the master, and the

$4437.50 and $500.00 paid by the receiver to his solicitor in preparing his final account and representing the receiver. It must be borne in mind that when the receiver filed his report and account, he had withdrawn from the rents collected by him $23,085.45 on account of his services, and had asked for an additional allowance of $15,000.00, making a total allowance claimed by him of $38,085.45, which sum might have been allowed by the court, if no objection had been made. Jones, however, filed objections and was required to employ counsel to contest the matter before the master. Jones was in part successful, because the master recommended that the receiver be allowed $19,915.75 in payment of his services. This amount was increased about $3,000.00 by the chancellor, so that it appears that on account of the contest made by Jones, it was held that the receiver was only entitled to a little more than one-half of what he was asking. In these circumstances, it would be inequitable to compel the estate to stand all the cost of the contest. Moreover, under our holding, the receiver is entitled to retain $19,915.75 in full for all of the services performed by the receiver, from which must be deducted the $6009.50 paid the superintendent Taylor, leaving a net amount to the receiver for his services of $13,906.25. We are, therefore, of the opinion that the estate ought not to be required to stand all of the expenses incurred before the master. There is no claim that counsel for the receiver is not entitled to the amount awarded him, but the contention of Jones is, that his services should be paid for by the receiver and not charged against the estate.

The receiver's final report and account consists of

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as changed

about 135 typewritten pages, most of which being an itemized statement of the receipts and disbursements made by the receiver, consisting of several hundred items was prepared and filed by counsel for the receiver and upon a consideration of such a report, it is not at all to be wondered at that there were some objections made, and this is especially so when the relation at that time existing between the receiver and Jones is taken into consideration. In these circumstances, it is obvious that the receiver would require the services of counsel in the preparation, filing and appearing before the court to have the report and account approved. For these services, of course, the estate is chargeable. We are, therefore of the opinion that the receiver should be allowed a reasonable amount with which to pay his counsel for such services, and we are of the opinion that a reasonable amount in this respect would be $1,000.00. We are of the opinion that the balance of such fees $3937.50 paid to counsel for the receiver should be charged to the receiver and not against the estate. We are further of the opinion that the $2182.50 paid the master and the $1287.50 to the court reporter, aggregating $3470.00, including costs in this court should be borne by the receiver and by the estate; one-fourth to be paid by the estate and three-fourths by the receiver.

The order of the Circuit Court appealed from is, therefore, reversed and the matter remanded with directions to enter an order in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON AND TAYLOR, JJ. CONCUR.

36 - 29111

GEORGE J. HABERER,
Defendant in Error,

v.

ALBERT FUCHS,
Plaintiff in Error.

237 I.A. 643

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Apr. 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

George J. Haberer, brought an action against Albert Fuchs to recover $18,900.00, claiming that amount was due him from the defendant as real estate broker's commission for obtaining a purchaser for the defendant's property. There was a verdict and a judgment in plaintiff's favor for $11,500.00, and the defendant prosecutes this writ of error.

The record discloses that the defendant was the owner of valuable real estate located on Broadway between Grace street and Sheridan road, Chicago, upon which there were extensive improvements, part of which were encumbered in the sum of $125,000.00 and another part in the sum of $40,000.00, and there was a second mortgage on all the property for $87,500.00. The latter mortgage was held by the Continental and Commercial National Bank, and it was pressing Fuchs for payment. Sometime during the month of June, 1920, he placed the property for sale with the plaintiff who was a real estate broker, and there is evidence tending to show that it was orally agreed between the plaintiff and the defendant that in case plain-

Opinion filed Apr. 29, 1926.

tiff made a sale of the property, he would be paid a commission of 3 percent. Plaintiff at once endeavored to sell the property, and after the 4th of July, 1920, submitted it to one Fred Becklenberg, who examined the property and who was introduced to the defendant by plaintiff as a prospective purchaser. Defendant was asking $1,500,000.00 for the property. Becklenberg said that he liked the property, but did not care for the theater building, for which the defendant was asking $870,000.00, but that he would take the balance of it for $630,000.00, to which the defendant agreed.

The evidence further tends to show that Becklenberg was to assume all mortgages, release the $87,500.00 mortgage which covered all the property, give in part payment five farms which he owned in Wisconsin for $180,000.00, and pay the defendant the balance of $217,500.00.

Afterwards plaintiff prepared an agreement to be executed by Becklenberg and the defendant, embodying the terms of their agreement and submitted the same to the defendant. The defendant said that he did not just like the agreement as prepared and that he would prepare one himself, and on July 20, 1920, plaintiff prepared such an agreement which was somewhat informal, being addressed to the plaintiff. Upon receipt of the document, plaintiff submitted it to Becklenberg who wrote on the bottom of it that he accepted the proposition and signed his name. Following the signatures of Becklenberg and the defendant, and on the same document, was a paragraph described as an agreement between plaintiff and defendant to the effect that it was agreed between them

that on account of the small price and little cash which Fuchs was obtaining for the property, one-half of plaintiff's commissions should be paid in cash only, and for the other half he was to take one of the five farms which Becklenberg was to convey to the defendant in part payment of the property. It provided: "No claim of any kind to be made by Haberer against Fuchs, if the above deal is not consummated by July 21, 1920, and the above option to be null and void on that day. This instrument void if recorded." This part of the instrument was not signed by Fuchs, nor was it signed by plaintiff. The agreement between Fuchs and Becklenberg, also provided that it was not to be recorded.

Shortly after July 20, 1920, when the agreement was signed by Becklenberg, the parties took the matter up with the Continental and Commercial National Bank in reference to the releasing of the second mortgage of $67,500.00. Becklenberg gave testimony tending to show that he was ready, willing and able to carry out the agreement, but that Fuchs refused to do so; he further testified that he had ample means to pay the $67,500.00, and that he submitted to the bank certain real estate located in Chicago, but that he was unable to get Fuchs to meet him with the bank officials so as to close transactions in this respect. On the other hand there was evidence given by Fuchs and a Vice President of the bank to the effect that Becklenberg was not able to carry out the transactions because the bank refused to loan him $67,500.00 on some real estate which Becklenberg submitted and which was owned by him and located on the north side of Chicago.

Fuchs gave testimony to the effect that the reason he was anxious to sell the property, was on account of his inability to raise the necessary cash to pay off the $67,500.00 and that unless he did so, all of the mortgage might be foreclosed; that the $67,500.00 was a call loan. He further testified that when the bank refused to loan the $67,500.00 he told Becklenberg he would give him a few days longer to carry out the deal and that Becklenberg replied that it was no use that he could not raise the money and that the deal was off.

The evidence tends to show that afterwards the contract executed by the defendant and Becklenberg was filed for record in the recorder's office; that sometime afterwards Becklenberg tendered deeds to his Wisconsin farms to the defendant, but that the defendant refused to accept them.

On the trial of the case, plaintiff took the position that when he introduced Becklenberg to Fuchs, they entered into an oral agreement for the purchase and sale of the property in question and thereupon he was entitled to his commission. This evidence was objected to by counsel for the defendant on the ground that oral statements made between Becklenberg and the defendant prior to July 20th were merged in the written contract executed by them on that date, and the objection was overruled. The plaintiff also took the position that he was entitled to his commissions by virtue of the fact that Fuchs and Becklenberg had entered into the written contract for the purchase and sale of the property on July 20th and that Becklenberg was ready, able and willing to carry out the written agreement.

The defendant's position seems to have been that the reason the deal fell through was because of the inability of Becklenberg to release the $67,500.00, second mortgage on the property. He made no objection concerning the Wisconsin farms and in his brief filed here, counsel for defendant states that the written contract was a binding agreement which might be specifically enforced. The defendant makes a further point that in no event was plaintiff to be paid unless the deal was consummated and that since the deal fell through, plaintiff was entitled to no commission. A further point is that plaintiff cannot maintain his suit because the written agreement was recorded and it was expressly stated therein that if the agreement was recorded, it would be null and void.

We have not discussed all of the evidence, because there must be a new trial. Whether the plaintiff would be entitled to his commission, even though the deal was not consummated, depends upon the evidence as to what his agreement was with the defendant, and we think we ought to say, that although neither plaintiff nor the defendant signed the written document in reference to the commission, yet we think that document is admissible as some evidence on the question of what their agreement was. We are further of the opinion that the evidence in the record fails to show that Becklenberg and Fuchs entered into such an oral arrangement in regard to the property as would warrant the plaintiff in claiming his commission. We think that oral agreement between Fuchs and Becklenberg is not to be considered as a finished agreement between the parties, but was only a general outline which

was afterwards reduced to writing. But the evidence given provided it did not contradict or vary the written agreement was admissible. We are further of the opinion that any claim plaintiff might have for his commissions was not lost by virtue of the recording of the document. The evidence tends to show that plaintiff did not record the document, but even if he did do so, this ought not to prevent him from recovering if he is otherwise entitled to it, because the instrument was not recorded until after the transaction fell through. But plaintiff contends that since the parties entered into a valid binding agreement, he was not required to prove that Becklenberg was ready, able and willing to carry out the contract, because by entering into the written agreement, Fuchs accepted Becklenberg and this was a determination of the latter's ability to perform the contract. Fox v. Ryan, 240 Ill. 391; Kushkiewicz v. St. George, 236 Ill. App. 310. The difficulty with this contention is that that was not the theory on which the plaintiff tried the case, but he sought to prove by evidence the ability of Becklenberg to carry out the contract, and this theory was contrary to Instruction 8, given at the request of plaintiff, which told the jury that if they believed the buyer of the property (Becklenberg) was willing to buy the property upon the terms submitted by the defendant, then the plaintiff could recover, unless the jury believed from the evidence that the commission was not payable unless the deal was consummated between the parties. This instruction omitted the element of the ability of Becklenberg to carry out the deal. Another instruction laying down an abstract proposition of law was given at the request of plaintiff in which the jury were told that a broker was

entitled to his commission where he procured a buyer who was ready, willing and able to buy upon the terms of the seller.

Although the point is not made, we think we ought to say, since there must be a new trial, that Instruction No. 8, was also wrong in that it assumed that Fuchs withdrew from the contract and refused to carry it out. This was a question that was disputed and therefore, should have been left to the jury, because the evidence of the defendant tended to show that the failure to carry out the transaction was occasioned by the inability of Becklenberg to release the $87,500.00 mortgage. Instructions Nos. 4, 5 and 7 contain substantially the same assumption.

We think too, the court erred in not permitting counsel for the defendant to examine Becklenberg as to what Fuchs said at the time he demanded a release of the premises from the cloud caused by the filing of the contract in the recorder's office which Becklenberg testified he caused to be recorded. We are also of the opinion that the instruction given on the question of interest was inaccurate because it did not require the jury to find that the delay, if any, was unreasonable and vexatious as the statute provides. However, it is apparent that the jury did not include interest so we are not reversing the judgment because of this instruction, but, as there is to be a new trial we are calling attention to its inaccuracy.

The judgment of the Circuit Court of Cook County is reversed the cause cause remanded.

THOMSON AND TAYLOR, JJ. CONCUR. REVERSED AND REMANDED.

29150

64 - 29150

HIBERNIAN BANKING ASSOCIATION,

vs.

CHICAGO TITLE & TRUST CO., ET AL,

ARTHUR R. JONES,

Plaintiff in Error,

vs.

FRANK M. MURRY, RECEIVER,

Defendant in Error.

237 I.A. 643

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

By this writ of error Arthur R. Jones seeks to reverse an order entered on the 17th of July 1923, by the Circuit Court of Cook County, authorizing the receiver to pay his solicitor the sum of $500.00 out of the proceeds in the receiver's hands.

We have this day filed an opinion involving an order entered by the Circuit Court in the same proceeding, where we disposed of the matters in controversy between the parties as well as the $500.00 involved in this writ of error, so that it is unnecessary to state anything further in this opinion, all matters having been disposed of and considered in the opinion filed in appeal No. 28851.

In accordance with that opinion, the order in question is reversed and the matter remanded.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

77 - 39164

ARTHUR W. DICKINSON and CHARLOTTE M. DICKINSON,

Defendants in Error,

v.

HENRY HEINHAUSEN AND MARY S. N. HEINHAUSEN,

Plaintiff in Error.

237 I.A. 643

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Apr. 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Complainants filed their bill against the defendants praying that they be decreed to have a vendor's lien on premises located in Wilmette for such amount as might be found due and owing to them upon an accounting. Complainants position was that on March 3, 1920, they entered into a written contract to sell a certain lot upon which they were to construct a residence for the defendant Henry Heinhausen for $11,500.00; that afterwards on March 23, 1920, complainants conveyed the premises by warranty deed to the defendant Mary S. N. Heinhausen, wife of Henry Heinhausen, at the latter's request, and complainants claim that there was a balance of $1550.00 with interest, due them, less whatever sum might be deducted therefrom for adjustment of the 1920 taxes. The defendants filed an answer in which they set up that they expended, at the request of the complainants in and about the completion of the building, certain sums of money in addition to the payments which they made complainants;

averred that the complainants had not completed the building and there was nothing due; that on account of the inferior material used by the complainants in the construction of the building, and improper workmanship, it would take approximately $5,000.00 to place the building in good condition, and in accordance with the terms of the contract entered into between the parties, and that upon an accounting being had as prayed for by the complainants, there would be found due and owing from the complainants to the defendants more than $5,000.00. A replication was filed. The defendants filed a cross-bill, wherein they set up substantially the same matters as those that were alleged in their answer, except in greater detail and prayed that an accounting be taken and a decree entered requiring the complainants to pay to the defendants and cross-complainants the amount that might be found due. An answer was filed to the cross-bill and issues joined. The cause was referred to a master in chancery. The master proceeded to take proofs and after he had taken about 700 pages of evidence, the parties on the 20th of March, 1923, entered into a written agreement to arbitrate the matter in controversy, and the same person before whom the cause waspending as master was named as arbitrator and, on October 24, 1923, he made his report. It was filed in the pending cause on November 27 following and a decree entered on that date finding that there was a balance due complainants of $1734.33, for which complainants were given a vendor's lien. To reverse the decree the defendants prosecute this writ of error.

The agreement to arbitrate the matter in controversy, recited that there was then existing a dispute between the parties in regard to the premises in question, which controversy was more fully set forth in the pleadings in the cause then pending in the Circuit Court of Cook County; that that cause had been referred to a master in chancery and was there still pending, and that a great deal of evidence had been taken before the master and that there still remained much additional evidence in case the cause should be prosecuted to a final determination before the master. And it was agreed that the controversy between the parties be irrevocably submitted to William H. A. Rust, as sole arbitrator, to hear and determine all matters of law and fact involved upon the following conditions: (1) that the arbitrator should determine the controversy upon the evidence already taken and heard by him as master and upon his personal inspection of the premises and such further evidence as the arbitrator, after such inspection, might desire to hear; that the arbitrator might in his discretion, have the premises examined by any competent building contractor not interested in the controversy and take his advice. (2) That the parties and their counsel should be permitted to be present at any inspection of the premises made by the arbitrator and point out to him any matters they might desire and that counsel for both parties might have the opportunity to present arguments to the arbitrator before the final decision. (3) That the arbitrator should make his findings in writing and file same in the cause then pending; that his decision should be conclusive, final and binding

upon the parties; that upon such award being filed in the pending cause and upon notice to counsel either party might have a final decree entered in accordance with the finding and decision of the arbitrator; that if the arbitrator should find there was any sum due from the defendants to the complainants, then he should determine whether complainants were entitled to a vendor's lien on the premises, and if he should so find, then a decree might be entered that the complainants have a vendor's lien on the premises for the amount due, together with costs, if any. (4) It was further expressly agreed that if a decree was so entered in the cause, it should be final and conclusive upon all the parties; the parties having expressly waived any and all errors that might intervene, and that no appeal or writ of error should be prosecuted to reverse, vacate, set aside or modify the decree; and (5) that the costs theretofore expended and incurred in the cause, including the costs and expenses incurred before the master as well as the expenses of the arbitrator should be borne and paid by the parties; that the said arbitrator shall include in his award his determination and finding as to the amount of such costs and expenses and the proportion thereof to be paid by the respective parties and that his decision should be final and conclusive.

It appears from the record that after the arbitration agreement was entered into, the arbitrator together with the parties, viewed the premises twice. He made up his report in which he states: "I desire to say at the outset, that the record contains a large mass of evidence and I have

spent a great deal of time in hearing the testimony and in reading over the evidence, even having gone so far as to personally inspect the property in question, which is located in Wilmette, Illinois." The arbitrator then finds that a contract was entered into between complainants and the defendant Henry Meinhausen for the sale and purchase of the property in question for $11,500.00; that the contract of sale provided inter alia that the complainants in addition to equipping the premises in the usual and customary way should install a hot water boiler, heater, toilet in the basement, screens and screen doors and certain other improvements; that the defendants contended that the building had not been constructed or completed in accordance with the terms of the contract entered into between the parties; and that on the other hand complainants' position was that they had not only complied with the terms of the contract in every respect, but had done more than was required of them by the terms of the contract. He further found that there was a great mass of irreconcilable testimony; that under the law a substantial compliance with the terms of such a contract was sufficient; that he had been given opportunity of seeing, listening to and watching all of the many witnesses who had testified before him, "plus the opportunity of twice examining the building in question. I have very carefully applied all the known tests of credibility to those witnesses because it was my desire to pass upon the questions involved conscientiously and thoroughly and I believe I am in a position to do so." The arbitrator stated that he disliked to comment on the testimony of any witnesses, but felt constrained to say that

one or more of the witnesses in a desire to be successful in the outcome of the litigation, exceeded the bounds of prudence and credibility, to say the least; that he viewed with suspicion the testimony of such witnesses; that there was no doubt that the defendants had some causes of complaint, but that the numerous complaints and objections made by them were not warranted. He then found six specific items aggregating $268.25 for which the defendants should be given credit; that the defendants were not justified in making any further claim for any allowance; that complainants had substantially complied with the terms of the contract and were entitled to recover $1992.58, less the $268.25, leaving a net balance due of $1724.33, for which amount he found the complainants were entitled to a vendor's lien. He further found that the defendants had sold the property and were not occupying it and that the building in question compared favorably with the surrounding buildings in the neighborhood.

1. The defendants filed objections to the arbitrator's award and contended before the chancellor that it should be set aside, because his award showed that he was disqualified by reason of his bias and prejudice. This was the principal argument made before the chancellor as shown by the record and it was to the effect that bias and prejudice was shown because the arbitrator found against the defendants. Counsel expressly states that he does not wish to be understood as intimating that the arbitrator intended to act dishonestly, but that his award shows that he was in such a frame of mind

as not to give an impartial decision. The argument is so obviously untenable, that it could not be maintained in any court of justice. To say that because the award was made by the arbitrator against the defendants, that this showed prejudice and his award should therefore, be set aside, is equivalent to saying that every decision of every court or jury was the result of prejudice or bias, because they found against one of the parties. Upon a careful consideration of the record, we are clearly of the opinion that it discloses that the arbitrator gave very careful consideration to the master before him. He expressly states in his report that he had examined the evidence taken before him as a master, which was his duty under the arbitration agreement, that he observed the witnesses who testified before him; that he examined the premises twice and after this he found that the complainant had substantially complied with the terms of the contract, and further that the complaints made by the defendants were unwarranted, except in a few small matters. There is no merit in the contention made.

2. A further contention is made by the defendants that the award is void because the arbitrator failed to proceed in conformity with the submission agreement. It has long been the established law, as counsel for the defendants contends, that the sole authority in such a case as the one at bar, is found in the submission agreement, and that where the agreement is not substantially followed, the award will be set aside. In support of this contention, it is argued that

the arbitrator did not proceed in accordance with the submission agreement, in that he failed to consider the evidence which had theretofore been taken before him as a master in chancery. From what we have already said, we think it appears that the argument is unsound. The arbitrator's report expressly stated that he did consider such evidence and in addition viewed the premises twice. It is further said that the award is void, because it appears that the arbitrator, contrary to the submission agreement, compared the building in question with other buildings in the neighborhood. We have not the evidence in the record before us and it might be that when the parties appeared before the arbitrator they may have made complaints in regard to the condition of the building in question by comparing it with other buildings located in the neighborhood. However, this is of but minor importance since it clearly appears that he considered all of the evidence taken before him as master as well as his view of the premises. It is further argued in this connection that the award is not responsive to the issues because it ignored the matter set forth in the crossbill. We think this is not borne out by the record, because the record discloses that all matters in controversy between the parties effecting the property in question were submitted, and it was not necessary that the arbitrator should refer to the various pleadings in his report, and our Supreme Court has held in the case of Stearns v. Cope, 109 Ill. 340, that where the matter in controversy relates to cross money demands, the better practice is for the arbitrator to find the amount due from one of the parties to the other as a gross sum and not to go into details.

It is next argued that the arbitrator failed to pass on all matters submitted to him, and therefore, his award should be set aside. In this connection it is pointed out that the submission agreement expressly provided that the arbitrator should determine the amount of costs and expenses and the proportion which each of the parties should pay and that no such finding has been made. Upon a consideration of the report, it is clear that all of the costs were awarded against the defendants, because the arbitrator expressly finds that the complainants had substantially complied with the requirements of the contract entered into between the parties for the purchase and sale of the real estate; that the complaints made by the defendants were almost wholly unwarranted, and under the holding of the Stearns case, we think the report in this respect was sufficient. To the same effect is the case of Podolsky v. Haskin, 394 Ill. 443, where it was said, (p.450) "The object of arbitration is to avoid the formalities, delay and expense of litigation in court, and the decision of the arbitrators, acting within the scope of their authority under the submission agreement, is conclusive on the parties upon matters of law and fact."

3. It is next contended that the court erred in refusing to admit evidence offered by the defendants to show that the award was excessive, and that this appeared on the face of the award. It is said that the award was excessive in that the claim made by complainants in their bill was for $1550.00, less an adjustment for the taxes of 1920, while the award was $1992.58, less a credit of $368.25. It must be

remembered that complainants bill was filed July 3, 1920, more than three years before the arbitrator made up his report. Moreover, the submission agreement submitted all matters in controversy in connection with the property and, while it referred to the pleadings filed in the case, this was only pointing out in a general way that the matters submitted referred to the property in question, and it cannot be said that complainants were limited to the amount set forth in the bill.

4. It is further contended that the decree entered is erroneous, because it treats the award made by the arbitrator as a master's report. We think this is not warranted by the record. We think it clear, that while the master and the arbitrator was the same person, that the report made by him was made as an arbitrator.

We are of the opinion that the arbitrator substantially followed the submission agreement and the decree is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

88 - 29175

HARRY SKLAR,
Appellee,

v.

HYDROX COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages claimed to have been sustained by reason of his automobile being struck and damaged by one of defendant's trucks. He claimed that he had been required to pay $100.00 to repair the damage to his automobile, and that he also paid $80.00 for renting another automobile during the period of time which it took to repair the damaged car. There was a trial before the court without a jury and a finding and judgment entered in plaintiff's favor for $122.41.

The record discloses that plaintiff, who was an interior decorator, and who used a Ford automobile in his business, was driving east in Jackson Boulevard at about three o'clock on the afternoon of January 8, 1923, and as he was crossing Paulina Street, his automobile was struck by a truck which was being driven south in Paulina Street by one of defendant's employes. The car was repaired by one engaged in that line of business and who made a charge of $82.49, which the plaintiff paid. The evidence further showed

that during the time the plaintiff's truck was being repaired, he hired another Ford truck and used it in the conduct of his business for which he paid a rental of $8.00 per day and the court made an allowance of $40.00, the evidence showing that it took five days to make the repairs.

The defendant contends (1) that the greater weight of the evidence shows that the defendant was not guilty of the negligence charged; (2) That plaintiff was guilty of contributory negligence;and (3) That theevidence does not support the allowance for rental of the automobile.

The evidence introduced on behalf of the plaintiff tended to show that plaintiff was driving his Ford car east in Jackson Boulevard at about twelve to fifteen miles per hour; that defendants' truck, which had a capacity of about five tons, was being driven south in Paulina Street at about the same rate of speed; that the driver did not stop at the north side of Jackson Boulevard, but proceeded across that street without slackening the speed of the truck; that the collision occurred in the south half of Jackson Boulevard and about in the west or southbound street car track in Paulina Street. The front of the defendant's truck struck plaintiff's Ford about midway on the north side of the car. Plaintiff testified that he did not look toward the north as he approached Paulina Street but only looked toward the south; and that he did not see the defendants' truck until the collision. An examination of the record indicates that plaintiff was a foreigner and spoke our language with difficulty and it is clear that he did not always

understand the questions put to him. After giving this testimony he was asked," Q. Didn't your sight cover the field, the width of the boulevard? A. Yes, I look at him right; I seen him from the left side. Q. Did you turn your head? A. I turn this way, (indicating) and I seen the truck is going too fast: I could not stop my machine."

For the defendants witnesses testified that the defendants' truck was stopped before entering the street intersection, and then started up slowly across Jackson Boulevard. The driver of the truck testified to this effect and further that he did not see plaintiff's truck until he reached the center of the intersection; that when it appeared there was about to be a collision plaintiff "stepped on the gas" in an endeavor to pass in front of defendants' truck; that the driver of the truck was unable to stop in time and the collision occurred. From this it is obvious that the driver of the defendants' truck was negligent in failing to look for traffic; moreover, under the statute, plaintiff had the right of way. Salmon v. Wilson, 227 Ill. App. 286; Upon an examination of all the evidence in the record, we are unable to say that the finding of the trial court in favor of the plaintiff as to the negligence of the defendant and as to whether plaintiff was guilty of contributory negligence is against the manifest weight of the evidence. We think these two questions were proper ones for the trial judge, and in these circumstances, we would not be warranted in disturbing the finding of the court unless we are able to say that such finding is against the manifest weight of the evidence. This we are unable to do. We think it cannot

be said that plaintiff was guilty of negligence, as a matter of law or as a matter of fact, but that these questions were for the trial judge.

The evidence discloses that the damage done plaintiff's Ford truck was repaired by a man who was engaged in that business and that plaintiff was charged for such repairs $82.49 which he paid. This was sufficient proof, there being none to the contrary. Gloyes v. Plantis, 231 Ill. App. 183. However, plaintiff did offer additional evidence on this point. But defendant contends that the evidence on which the allowance of $40.00 paid by plaintiff for the rental of another Ford truck during the time his truck was being repaired was insufficient, because the evidence shows that plaintiff rented the truck from a private person not engaged in the business of renting trucks, and that the evidence did not show that the charge of $8.00 per day was the usual, reasonable and customary charge. That plaintiff would be entitled to this expense is not disputed by the defendant and the law warrants such an allowance. McCabe v. Chicago and Northwestern Ry. Co., 315 Ill. App. 99; Travis v. Pierson, 43 Ill. App. 579. But the defendant contends that the evidence is insufficient. The evidence tends to show that plaintiff rented the truck from a Ford dealer and paid him $8.00 per day and that he used this truck five days during which period his damaged truck was being repaired. A witness for the defendant testified that he wasemployed by counsel for the plaintiff; that prior to that time he had driven a yellow taxicab for about a year; that he passed the Ford Rental Company on Michigan Avenue where advertisements were displayed to the effect that that company

would rent a Ford car for from $8.00 to $10.00 per day. He further testified that he was familiar with charges made by garage companies for such rental; that he had been with persons that hired some of these cars for the purpose of taking trips into the country. This is all of the evidence in the record on this point and while it is rather meager, we think it is sufficient under the circumstances.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

161 - 23250

JAN MIHRAK and HENRI MIHRAK,
Appellees,

v.

FRANK ZUNCIC,
Appellant.

237 I.A. 644

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Frank Zuncic filed a motion in writing to open and vacate a judgment for $800.00 entered by confession against him and for leave to plead. The motion was denied and he appeals. A number of documents which the clerk has copied into the record, have on motion of plaintiff been stricken because they were not incorporated in the bill of exceptions, so that there is before us only the declaration, cognovit, judgment, the order denying the defendant's motion to vacate the judgment and the order allowing the appeal and approving the appeal bond.

On a motion to vacate a judgment entered by confession, the controlling inquiry is whether there exists an equitable reason for opening the judgment to let in a defense and the question is not whether the judgment should be set aside for errors of law. Moyses v. Schendorf, 238 Ill. 233. In the instant case, therefore the question is does the record before us disclose that the judgment is inequitable? It is

Quinlor filed April 16, 1985.

[illegible] Mandatory injunction granted enforcing the opinion of the court.

Frank Jones filed a motion to open judgment, adopted for 0000.00 entered by confessed on [illegible] him and for leave to plead. The motion was denied on [illegible]. Plaintiff filed [illegible] and [illegible] motion for [illegible], and in [illegible] activities [illegible] [illegible] [illegible]

alleged in the declaration that on the 20th of June, 1923, the then owner of certain premises in Cicero, Illinois, entered into a written lease with the defendant, whereby the premises were demised for a period beginning October 10, 1923, for a term of one year at a rental of $600.00, payable in monthly installments of $50.00 per month; that the defendant entered into the possession of the premises on the 10th of October, 1923 and continued in such possession until January 2, 1924. And it is alleged that there was due and unpaid $750.00 rent which accrued during the three months which the tenant held over under section 8 of the lease. The cognovit filed admits that the $750.00 is due as alleged and in addition $50.00 for plaintiff's reasonable attorney's fees and other costs. From this it appears that while the lease required the payment of a rental of $50.00 per month during the term covered by the lease, it contained a further provision that in case the tenant held over, he would be required to pay $250.00 per month, because it is alleged that under section 8 of the lease there was $750.00 due as rent for the three months which the plaintiff held over. It is clear that this rent cannot be considered as liquidated damages but as a penalty, and therefore, plaintiff is entitled to recover only the damages which he has actually sustained. Scofield v. Schendorf, 95 Ill. 190. Where the amount agreedupon to be paid in case of breach of contract is out of proportion to the probable damages sustained, the court will treat the same as a penalty. Iroquois Furnace v. Wilkin Manf. Co. 181 Ill. 582.

In the instant case, on the record before us, it would be unconscionable to permit plaintiff to recover $250.00 per month where the rental reserved by the lease was but $50.00 per month. The court should have sustained the defendant's motion to open up the judgment and for failure to do so, the order appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

29262

173 - 29262

FRANK J. SMITHIN, Appellee, v. MACK-INTERNATIONAL MOTOR TRUCK CORPORATION, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 644

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $7200.00,- a verdict was rendered in his favor for $2500.00. The court required a remittitur of $700.00, and judgment was entered for $1800.00.

The damages which plaintiff claimed were made up of three items, as appears by his statement of claim. As to the first item plaintiff alleges that he was the owner of a 7½ ton motor truck which on the 16th day of January, 1921, he delivered to the defendant for storage; that afterwards the defendant without authority "placed said truck in active service for twenty-four hours per day, for 100 days, between January 16, 1921 and April 28, 1921"; that the defendant thereby became liable to plaintiff for the reasonable rental value of the truck; that the reasonable rental value of the truck was $30.00 for each eight hour period and that, therefore, he was entitled to not less than $4,000.00. The second item in the statement of claim is that the defendant during

such period of time - (between January 16th and April 28th, 1921) permitted the truck to be so negligently and carelessly used that it was damaged; that by reason thereof it required sixty days to repair the damage, during which period plaintiff was deprived of the use of the truck and thereby lost profits which he would have earned, amounting to $20.00 per day or a net sum of $1200.00. As to the third item, it is alleged that during that period the defendant used the truck so carelessly and negligently that the truck was damaged to the extent of $2,000.00.

To the statement of claim the defendant filed an affidavit of merits setting up that it sold the truck to the plaintiff and that plaintiff executed a chattel mortgage for the balance of the purchase price of $6,000.00 which was evidenced by his promissory notes; that plaintiff made default in payment and thereupon defendant took possession of the truck in January, 1921; that pending a sale of the truck under the chattel mortgage or other agreement that might be entered into between the parties, the defendant stored the truck and afterwards plaintiff made claim against the defendant for alleged damages to the truck while it was stored and for an alleged use of the truck by the defendant; that afterwards the parties made a new agreement in which all differences between them were adjusted whereby the defendant made no charges for storing the truck and further agreed to make certain repairs on the truck without charge to the plaintiff, and extended the time of payment of the balance due; that under this agreement plaintiff on July 13, 1921 executed a new chattel mortgage and his notes for the balance due for the truck and

thereupon the truck was delivered to the plaintiff; that afterwards plaintiff was again in default in payment and the defendant again took possession of the truck and later another agreement was entered into between the parties whereby the second chattel mortgage and notes were surrendered and the plaintiff made a third chattel mortgage on the truck, together with his notes for the balance then due on the purchase price. The affidavit of merits denied that the defendant placed the truck in actual service; that plaintiff had lost any profits while waiting for the truck to be repaired and denied that the defendant had carelessly and negligently used the truck so as to damage it.

Plaintiff gave testimony to theeffect that he purchased the truck for about $8,000.00 August, 1930, paid $2,000.00 on account of the purchase price and executed his note and a chattel mortgage to secure the balance; that sometime in December, 1930, when work was rather slack, he requested the defendant to store the truck for him; that an agreement to this effect was reached sometime during the early part of January, 1931 and the truck was delivered to the defendant on the 13th day of that month and placed in storage; that afterwards plaintiff made complaint to the defendant that the truck was being used and that on or about April 28, 1931, the defendant saw the truck and it was then greatly damaged and he again complained of this to the defendant; that he then told the defendant that he wanted to take the truck as he had some work to do and the truck seems to have been delivered to him about that time. He further testified that the truck was in such condition that it could

not be used and therefore, he could not do the job which he had obtained and that it was returned to the defendant within a few days; that afterwards from time to time he tried to obtain the truck, but was unable to do so because the defendants were repairing it; that on July 13, he executed a new chattel mortgage and on that day, or the day following, he obtained the truck from the defendants the latter having made some repairs on it and it appears that after obtaining the truck at that time plaintiff used it until sometime in the following December, when the evidence shows the defendant again took the truck under the chattel mortgage because of plaintiff's default in failing to pay the notes when they came due and plaintiff again executed a third chattel mortgage for the remainder of the purchase price, which was evidenced by his promissory notes. Afterwards all of the notes were paid. The evidence further shows that on July 13th, the time of payment was extended and the several payments were reduced in amount; that again in December, an extension was made and there was some further reduction made in the amount of the payments. Other witnesses testified on behalf of the plaintiff tending to show that the truck had been used between January 13th and April 28th, 1921. Witnesses for the defendant testified and denied that it had made any use of the truck while it was in storage or that it had received any profits for the use of the truck.

The evidence given by the plaintiff as well as that on behalf of the defendant indicated that if the truck was used while in storage, it was done without the authority of the defendant, although evidence was given on behalf of the

plaintiff that might indicate that some authorized use was made of the truck by the defendant.

Instructions were given at the request of both parties but none of them advised the jury on the question of plaintiff's claim for damages for the reasonable rental value of the truck during the time plaintiff claimed it was used by the defendant. The only instruction that touched this question was one given at the request of the plaintiff which told the jury, among other things, that if plaintiff stored the truck with the defendant under an arrangement whereby the time of payment of plaintiff's notes for part of the purchase price was extended and plaintiff was to pay the defendant storage charges, then if defendant without authority used the truck, it would be a violation of such agreement and the defendant would be liable for any damages sustained by the plaintiff resulting from such use. This did not tell the jury that they might, in fixing plaintiff's damages, give him the reasonable rental value of the truck for the time it was used by the defendant without authority. Moreover, we think the evidence on this phase of the case is of such an uncertain character as not to warrant the allowance of any substantial sum. Some of the witnesses testified that the truck was used but two days. Plaintiff testified that some of the men in charge of the plant where the truck was stored told him that it was used two months and plaintiff testified that one of these witnesses who seemed to have been in charge of the place, told plaintiff not to advise the defendants' officials that the truck had been used and that the witness would pay plaintiff$400.00 and that he would

repair the truck. This testimony strongly indicates that if the truck was used for any length of time, it was without the authority of the defendant.

As to the second item of damage claimed by the plaintiff, viz. $1300.00 for loss of profits occasioned by the fact that it took sixty days time to repair the damage done to the truck, there is little or no evidence and that item seems to have been practically abandoned in this court by plaintiff. There is no evidence that plaintiff's profits would have been $20.00 per day for sixty days had he been able to get the truck. The only evidence is that he had a job to do at Palos Park, but could not use the truck on account of its damaged condition. There is no evidence at all as to what profits would be received for this work and, therefore, no claim could be predicated on this item.

The principal claim made by the plaintiff is that the judgment should be sustained because the evidence shows that the truck was so damaged that it would require $2,000.00 to repair it. A witness for the plaintiff gave testimony to the effect that he had examined the truck about the latter part of April, 1931, and, in his opinion, it would take $2,000.00 to make the necessary repairs. The evidence further shows that after July 13th, plaintiff took the truck and he testified that all of the repairs, that were made on the truck, were those that were done by the defendant, the plaintiff and one Ward.

The defendant introduced evidence to the effect that

on July 13, 1921, it had made all of the repairs necessary and that plaintiff in writing acknowledged this to be a fact. An instruction was given at the request of the defendant which told the jury that if they found for the plaintiff the measure of damages for injury to the truck while in the defendant's possession was "such reasonable cost as the plaintiff prudently and in good faith expended, including the reasonable value of his own services, if any, to repair the injury sustained. This instruction is on the theory that all the repairs had been made, and if so, the proper measure of damages would be the cost of making such repairs and not the estimate of such cost as testified to by the witness Ross.

We think we ought to say that the evidence strongly indicates, as the defendant contends, that the truck was placed in storage, not at the request of the plaintiff as he here contends, but at the request of the defendant to protect itself under the mortgage and indeed this is what plaintiff testified to in the case of Smith v. Mack-International Motor Truck Corporation, No. 29473, decided by another division of this court in which case this very question was involved. The evidence in the record is of too uncertain a character to form the basis for the allowance of substantial damages.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

186 - 29275

PURITAN SILKS CORPORATION,

Appellee,

v.

LEON FREEMAN,

Appellant.

237 I.A. 644

APPEAL

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $1908.70 with interest thereon, claimed to be the balance due for a quantity of satin sold by plaintiff to the defendant. The case was tried before the court without a jury and there was a finding and judgment in favor of plaintiff for the amount of its claim, $2196.12, and the defendant appeals.

The plaintiff alleged in its amended statement of claim that on December 31, 1919, it sold to the defendant 3,000 yards of 36 inch satin at $1.65 per yard; that it made certain deliveries under the order; that defendant had paid for some of the deliveries and had returned a certain number of yards to the plaintiff by agreement so that all matters had been adjusted between the parties, except two deliveries of the satin which were made on June 25th and June 30th, 1920; that these two shipments were as follows:

June 26, 1920	947-6/8 Yards		$1563.79
" 30, 1920	450-2/8 "		742.91
		Total	$2306.70
July 9, 1920 credit for	256-2/8 Yards returned		423.43
			$1883.27

Leaving a balance due as claimed by the plaintiff for these shipments of $1883.27. In addition to this there were two small items aggregating $19.50, about which there was no dispute. So that the total amount claimed by plaintiff was $1902.77 with interest thereon.

To the original statement of claim the defendant filed an affidavit of merits in which he set up, among other things, that he owed plaintiff but $116.92; that he had the balance of the goods on hand, subject to the order of the plaintiff, and had so notified plaintiff. Afterwards plaintiff filed an amended statement of claim to which the defendant filed an affidavit of merits, in which it was set up, inter alia, that the satin in question was furnished by the plaintiff for manufacture by the defendants into printed labels and that sometime in August, 1920 when the defendant cut the satin into strips for the label printing, he discovered latent defects in the satin, on account of which he was unable to use it; that upon such discovery, being made by him, he notified the plaintiff of such defects and offered to return all of the material to the plaintiff. Afterwards defendant filed interrogatories, and an amended affidavit of merits in which he set up that on April 27, 1923, he tendered $31.69 to the plaintiff, being the amount then due and owing from him; that the tender was refused; that afterwards he renewed the tender in open court when it was again refused; and

thereupon, pursuant to leave of court, he deposited that amount with the clerk of the court, who was directed to pay the sum to the plaintiff upon demand. The amended affidavit further set up that on December 31, 1919, the parties entered into an oral agreement, whereby plaintiff agreed to sell to the defendant the satin as mentioned in plaintiff's amended statement of claim, and that it was then agreed that the satin should be of a kind and quality known as "label finish"; that at that time and for a long time prior thereto, defendant had been engaged in the business of printing and manufacturing cloth labels, all of which was known to plaintiff, and that plaintiff knew that the defendant was to use the satin in printing labels. The affidavit then set up that plaintiff had made certain deliveries of the satin, which is unnecessary to refer to here. It was then alleged that the goods in question, which were delivered by the plaintifftto the defendant and retained, were latently defective, in that the sizing had been applied improperly to the goods, and, therefore, the satin was not label finished, which defect was or should have been known to the plaintiff; that it was impossible for the defendant by any of the usual or customary tests to discover this defect, and that he did not discover it until he afterwards tried to print labels upon the material; that during the month of August, 1920, defendant had part of the satin cut into strips for label printing at which time he discovered the latent defects in the satin "whereupon this defendant forthwith notified the said plaintiff of such defects in all of the materials delivered as aforesaid and offered to return all of

the said material to the said plaintiff."

On the trial plaintiff offered in evidence a number of letters pas ing between the parties by which plaintiff was seeking to secure payment for the goods in question and the defendant was refusing to pay on the ground that the satin was not of the quality called for by the contract, and that he was holding the goods subject to plaintiff's order. On December 31, 1920, the defendant wrote plaintiff a letter in which he set up a statement of the account, showing that he owed the plaintiff $1908.72, being the same amount and based on the same items here sued for, less a credit for 1977 yards which he had on hand and which goods he claimed were defective, and for which he claimed a credit of $1.65 per yard, leaving a balance due from the defendant of $125.72, less $8.80 discount, which left a net amount of $116.92, for which sum the defendant sent plaintiff a check. Plaintiff refused to accept this check and returned it and after some further correspondence, the defendant on January 8, 1921 wrote plaintiff a letter in which he stated "We do not intend to pay for this goods and we are holding the goods, subject to your order. This is our final decision."

Prior to that letter the defendant on November 10, 1920, wrote plaintiff a letter stating "We have these goods laying in our office awaiting your disposition", and on November 15th in another letter to plaintiff the defendant stated, "The merchandise we have on hand which has been laying in our office now close on to two months, awaiting its disposition, should be removed and returned to the manufacturer." Other letters are to the same effect.

Plaintiff contends that since this correspondence discloses that the defendant sought to rescind the contract and since this was the theory advanced by the defendant in he his original affidavit of merits, he ought not now be permitted to shift his position and seek recoupment on the ground that the goods were not as warranted; that the record discloses that the first time the defendant took the position that he was entitled to recoupment, was on May 1, 1923, which was more than two years after the suit was brought when he filed his amended affidavit of merits. This latter statement of plaintiff is not borne out by the record, because the record discloses that the defendant's amended affidavit of merits which he filed on May 1, 1923, was also on the theory of rescission and he did not there set up any facts that would tend to sustain the contention that he was entitled to recoupment. The first time that the defendant took this position was during the trial when the evidence and the discussion between court and counsel was to the effect that since the defendant was not in a position to rescind the contract in toto he could not rescind at all. It was then that counsel for the defendant contended that he was entitled to recoup the damages he had sustained by reason of the fact that the satin was not of the quality purchased. In fact there is no evidence in the record that tends to show that defendant at any time accepted the goods in controversy, but all of the evidence is to the effect that he refused to accept the goods and wanted to return them. But after counsel had taken this stand during the trial, he then sought to prove the difference in the value of the goods as they were delivered in their alleged defective condition, and what they would have been

worth if of the quality called for by the contract. The defendant having taken the position as above stated, that he had refused to accept the goods in question and that he was holding them subject to plaintiff's order, he will not be permitted to shift his position during the trial and claim that he was entitled to recoup his damages for breach of warranty. Howe v. Fulton, 225 Ill. App. 589. And in no event would the defendant be entitled to recoup the amount of his damages, if any, because all the evidence in the record shows, not that he had accepted the satin and was willing to pay what it was actually worth, but on the contrary that he had refused to accept it. But even if we assume that the defendant would be entitled to recoup any damages he had sustained by reason of a breach of warranty of the satin, we think under the facts he lost any such right because he failed to notify plaintiff of any claim of breach of warranty within a reasonable time after he had received the goods. Sec. 49 of the Uniform Sales Act, provides that in the absence of an expressed or implied agreement, the acceptance of the goods by the buyer shall not discharge the seller from liability in damages for breach of warranty, provided the buyer, after acceptance of the goods, notifies theseller within a reasonable time after he knows or ought to know of such breach. Under the facts in the record, we are of the opinion that the defendant did not give such notice within a reasonable time as a matter of law. The record discloses that the goods in question were delivered to the defendant on June 25 and 30, 1920; that upon receipt of them, he made the usual and customary examination and such

examination did not disclose any defects; that sometime during July he sent the goods in question to New York for the purpose of having them cut into strips; that when the material was returned to him it was in a spotted condition which he attributed to some fault of the New York cutter; that there upon a controversy arose between him and the cutter, and after this was settled he attempted to print labels upon the slips when he first discovered that the material was latently defective. This was in August, 1930. The evidence further shows that plaintiff did the printing himself and that after plaintiff and defendant got into a controversy the defendant in the presence of a representative of theplaintiff printed on some of the goods which are in the record and which were not cut into strips. From this it appears that there was no reason why the defendant could not have discovered any such defects without sending the goods to the cutter in New York. The defendant could have found the defect, if there was such a defect, within a few days after he received the goods. And under the law, he could not wait until such time as he saw fit to test the goods in any manner that he might deem necessary to discover any latent defects. Whether any such notice of an alleged defect has been given within a reasonable time, is generally a question of fact, but where all reasonable minds would reach the conclusion that such notice was not given within a reasonable time, it then becomes a question of law for the court. 2 Williston on Sales (2nd Ed.) Sec. 484; Canada Maple Exchange, Ltd v. Scudder Syrup Co., 223 Ill. App. 165; Eureka Waist Co. v. Herrick

Brothers & Co., 226 Ill. App. 316.

Under the facts in the record, we are of the opinion that all reasonable minds would reach the conclusion that the latent defect in the satin, if any, should have been discovered by the defendant long before he claims to have done so, and therefore, he lost any right of recoupment he might have had. Sec. 49 of the Uniform Sales Act; Canada Maple Exchange, Ltd v. Scudder Syrup Co. supra.

There is no merit in the contention that the judgment is excessive in the sum of $31.69 which the defendant by order of court deposited with the clerk of the court to be paid to plaintiff upon demand. The record does not disclose that this money was paid to the clerk. Nor that he was directed to turn it over to plaintiff. The order of the court gave the defendant leave to deposit $31.69 with the clerk of the court "to be held until further order of court."

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TRUMBOW AND TAYLOR, JJ. CONCUR.

205 - 29294

MR. AND MRS. LOUIS MOSKES,

Appellees,

v.

GEORGE W. GREEN,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinionfiled April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $600.00 which they had deposited with the defendant who was a real estate broker for the purchase of property known as No. 517 East Forty-second Place, Chicago. There was a trial before the court without a jury and a finding and judgment entered in plaintiffs' favor for the amount of their claim and the defendant appeals.

The record discloses that plaintiffs were desirous of purchasing some real estate and were brought in touch with the defendant, who was a real estate broker and on the 29th of June, 1923, they paid him a deposit of $200.00 as earnest money to be applied on the purchase price of the property, the price of which was $25,000.00 and on the 5th of July following, they made another payment of $400.00 and it is to recover this $600.00 that they brought the instant case.

The evidence further discloses that after the defendant Green had received the $200.00 on June 29th, he

took the matter up with the owner of the property, Frank Schaedler and the latter refused to sell to plaintiffs because they had not enough ready money. Afterwards the defendant Green, informed the plaintiffs of this fact and it was suggested that Green might buy the property himself and he then would re-sell it to plaintiffs and on July 14th following, the defendant entered into an agreement with Schaedler, whereby the latter agreed to convey to him the property in question for $25,500.00, $3,000.00 in cash and $300.00 per month thereafter. The property was subject to two mortgages, one for $5,000.00 and the other for $7500.00. There was no provision in the contract for securing the payment of the balance of the purchase price, viz. $9700.00. After receiving this contract the defendant handed it to plaintiffs without formal assignment. The evidence further shows that on July 5, 1923, when plaintiffs paid the $400.00, or shortly thereafter, it was discovered that the receipt which the defendant gave the plaintiffs stated that the price of the property was $25,500.00 and not $25,000.00 as had been theretofore agreed and plaintiffs objected to this increase in price of $500.00.

The testimony of the defendant was to the effect that this increase of $500.00 was occasioned by the fact that plaintiffs were to turn in in part payment eight lots which they owned and that it was discovered that there was an assessment against these lots of $500.00. There is a conflict in the evidence on this point, but in the view we take of the case it is immaterial.

The evidence further discloses that the contract entered into between Schaedler and Green was turned over to counsel for plaintiffs together with an abstract of title and the latter took the matter up with Green, stating that the contract should have been signed by Schaedler's wife and this was not done and the deal fell through, principally, on account of the dispute between the parties in reference to the $500.00 additional in the purchase price of the property.

A number of points are made and argued by both sides, but most of them are immaterial in the view we take of the case. It will be observed that the contract in question for the purchase of the real estate ran to the defendant Green. It was not assigned to the plaintiffs and they had no interest in it. It is not explained why Green agreed with Schaedler, the owner of the property, to pay the latter $500.00 more for the property than he was willing to sell it for. The fact that there was a $500.00 incumbrance against the plaintiff's property, is certainly not a satisfactory explanation. If the defendant was to pay this as he claims, there would be no reason for adding it to the purchase price to be paid to Schaedler. In any event plaintiffs received nothing for their money. They had no interest in the contract. Green entered into no contract to re-sell the property to them and he, therefore, has in his possession $800.00 of plaintiffs' money for which he neither gave nor offered to give anything. From this it clearly follows that plaintiffs are entitled to the return of their money and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ., CONCUR.

A 303

314 - 29303

237 I. A. 344

LOUIS FORSTER,

Appellee,

v.

S. DEICHES & CO., a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought a suit against the defendant seeking to recover two items, one in the sum of $5,000.00 and the other in the sum of $509.00. He alleged in his statement of claim that, for a number of years, he had been employed by the defendant as a traveling salesman and in the year 1912, he entered into a new oral agreement to represent defendant as its traveling salesman in certain specified territory, for which he was to receive as compensation a commission of 10 percent on all goods sold, traveling expenses and premiums on his life insurance policies on which there were premiums amounting to $509.00 per year. He further alleged that he continued to be employed by defendant from 1912 until 1919 under this arrangement and that there was due and owing to him on account of goods sold $5,000.00 and the further sum of $509.00, being the amount of insurance premiums for the years 1918 and 1919.

The defendant filed an affidavit of merits and denied that an oral agreement had been entered into between

Opinion filed April 20, 1960.

the parties in 1912 and further denied that it agreed to pay the insurance premiums as plaintiff alleged.

The case was heard before the court without a jury and there was a finding and judgment in plaintiff's favor for the amount of the insurance premiums for the year 1919 in the sum of $509.80. No evidence was offered on the trial in reference to the $5,000.00 which plaintiff claimed.

On the trial plaintiff testified that about the year 1912, a new oral agreement was entered into whereby plaintiff claimed that he should receive additional compensation because he had been doing additional work for the defendant in attending certain conventions which was not a part of his regular duties and that as compensation for this work, defendant agreed to pay plaintiff's life insurance premiums each year. The undisputed evidence is that the last payments of such premiums were made by the defendant by giving its two checks, one dated January 3, 1918 for $239.25 and the other dated February 5,1918, for $270.55. The evidence further shows that during the latter part of December, 1918, or the fore part of January, 1919, the defendant refused to pay any further premiums and about the latter part of March, 1919, the defendant still refusing to pay the premiums, plaintiff left the defendant's employment.

The trial was had on November 7, 1923, and the court found against the defendant in favor of plaintiff for $509.80. The defendant made a motion for a new trial and there appears in the record an affidavit made by the president of the defendant company on December 15, 1923,

to the effect that on the trial defendant had been taken by surprise in that it then learned, for the first time, that plaintiff was claiming compensation for attending conventions on behalf of the defendant and that defendant had learned since the trial that plaintiff had not attended the conventions for the years 1917 and 1918, but that other representatives had done so. The motion for a new trial was overruled and judgment entered.

The defendant contends that the judgment should be reversed because the proof does not sustain the allegations of the statement of claim. There was no contention made on the trial that there was any variances and this being a case of the fourth class, there is no merit in the point. A further point is made that the evidence discloses that all of the policies of insurance held by plaintiff were not in existence in 1912 when plaintiff testified the new oral agreement was entered into, and therefore, plaintiff was not entitled to recover on account of non-payment by the defendant of any premium on any policy issued after that year. We think this point is not well taken, because plaintiff paid all of these premiums for a number of years thereafter without objection. Nor do we think defendant was in a position to urge as a defense the fact that plaintiff had not attended the conventions for the years 1917 and 1918. There was no showing of diligence in this respect. The evidence discloses that the insurance premiums were payable in advance and therefore, when on January 3rd and February 5, 1918, the defendant paid the insurance premiums, these were premiums that were due for the year 1918.

And the evidence discloses without dispute that in December, 1918, or in January, 1919, the defendant refused to pay any further premiums. It is the premiums for 1919 that are in controversy and the defendant having refused to pay the premiums as stated, it cannot be compelled to do so.

We think the trial judge was misled by the evidence, which is somewhat confusing, as to the year for which the plaintiff was seeking to compel the defendant to pay the premiums. It is clear that the premiums were those for the year 1919 and as the evidence shows without dispute that the defendant refused to pay these premiums, plaintiff is not entitled to recover and, therefore, the judgment of the Municipal Court of Chicago is reversed.

JUDGMENT REVERSED.

THOMSON AND TAYLOR, JJ., CONCUR.

223 - 29312

HERMAN A. LARSON,
Appellee,

v.

CHARLES E. DOERR,
Appellant.

237 I.A. 645

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages claimed to have been sustained through the negligence of the defendant in driving his automobile against plaintiff's and demolishing it. There was a trial before a court without a jury and a finding and judgment in plaintiff's favor for $800.00.

The record discloses that about 3:15 o'clock on the afternoon of September 3, 1923, plaintiff was driving his automobile in a northwesterly direction in Prairie avenue, Evanston, and at the same time the defendant was driving his automobile west in Harrison street and the two machines collided at the intersection of those two streets. Plaintiff's car was demolished and he sued to recover the damages, claiming that they were occasioned by the negligent driving by the defendant. On the other hand, the defendant's contention was that the collision occurred on account of the negligent driving by plaintiff.

Prairie avenue is a public street in Evanston and extends in a northwesterly and south easterly direction.

It is intersected by Harrison street which runs east and west. Harrison street does not run straight through at Prairie avenue but there is a jog to the north, so that Harrison street at the west side of Prairie avenue is further north than that at the east side.

Plaintiff testified that at the time in question he was driving his automobile northerly in Prairie avenue at about 20 miles per hour and that when he was about fifteen feet from the southeast corner of the street intersection, he saw the defendant's car approach about 150 feet east of Prairie avenue; that when plaintiff's car had reached a point about 15 feet north of the street intersection, it was struck near the rear by defendant's car, pushed toward the northwest and turned over so that when it came to a stop, the top of plaintiff's car was on the pavement and the wheels in the air. Plaintiff further testified that just prior to the accident the defendant was driving at from thirty to forty miles per hour.

Mrs. Carlson, plaintiff's sister-in-law, who was riding with him in the machine, testified that as they approached Harrison street, they were going about eighteen miles per hour; that she first saw the defendant's car coming from the east when it was about 50 feet east of Prairie avenue and that plaintiff's car was then about the middle of the intersection; that defendant's car hit plaintiff's car at the back, causing it to turn over. She estimated that the speed of defendant's car was about thirty to thirty-five miles per hour.

Dr. Swanson, who appeared to be entirely disinterested,

testified that he was sitting on the porch of his home, which was located near the northwest corner of the intersection; that he had a clear view of all the surroundings and saw the collision; that he saw plaintiff's car coming north on Prairie avenue, but did not see the defendant's until plaintiff's car had almost crossed Harrison street and that the front end of defendant's car struck the rear right wheel of plaintiff's car, and that when this occurred, plaintiff's car was nearly across the intersection. He would not undertake to estimate the speed of either car.

The defendant testified that he approached Prairie avenue at about twelve to fifteen miles per hour and that about the time his car reached Prairie avenue he slackened his speed until he was going from ten to twelve miles per hour; that plaintiff's car was being driven northerly in Prairie avenue at from thirty to thirty-five miles per hour; that he did not see plaintiff's car until it was a shortdistance to the south and, when it appeared that there was to be a collision, plaintiff turned his car slightly toward the west and the defendant toward the north; that the plaintiff's car caught defendant's left front fender and turned the machine around toward the northeast; that plaintiff's car finally pulled loose and turned over about 75 feet north of the intersection; that he noticed skid marks made by the plaintiff's car which were near the west side of Prairie avenue; that he measured those marks; that they commenced about 15 feet south of Harrison street near the west side of Prairie avenue; that the reason he did not see plaintiff's car sooner was that there was an automobile standing near the east curb south of the

intersection.

Frances King, who was riding with the defendant at the time, testified that when defendant's car was near the center of the intersection, plaintiff's car endeavored to pass it to the west; that the defendant in an endeavor to avoid the collision turned his car toward the north and plaintiff toward the west; that plaintiff's car struck defendant's and dragged it toward the north and then turned over; that at the time defendant's car was traveling at about 15 miles and plaintiff's 30 miles per hour; that she saw skid marks near the west curb of Prairie avenue.

Albert G. Stephenson testified that he went to the scene of the collision shortly after it occurred; that there was a number of people gathered around, including the police who placed defendant under arrest; that he noticed skid marks and made measurements of them, but there were no skid marks east on Harrison street, but there were skid marks near the west curb of Prairie avenue which were evidently made by plaintiff's car and extended about 40 or 50 feet, and that he had no interest in the case.

The police officer who ordered the arrest of the defendant testified on behalf of the defendant, that he came to the scene shortly after the accident, took the names of the parties and spoke to plaintiff; that he observed skid marks and said to plaintiff you must have skidded quite a distance. To which plaintiff replied, "Yes, I did"; that he showed the skid marks to plaintiff and stated that they were about 70

feet in length. The roadways of the street were macadamized and were dry and it was a pleasant afternoon.

This is substantially all of the testimony given so far as it is material for us to state it here.

The defendant contends that the finding of the court is against the manifest weight of the evidence, in that the evidence shows that the plaintiff was guilty of negligence and that the defendant was not; that the defendant reached the intersection first and that under the statute and decisions he had the right of way. From what we have said, we think it clear that the questions of whether the plaintiff was in the exercise of due care and whether his car was damaged by the negligence of the defendant, were questions of fact for the trial judge, and he having heard the witnesses' testify and observed their demeanor upon the stand, we cannot say, after a careful consideration of all the evidence in the record, that his finding is against the manifest weight of the evidence. In these circumstances, we are not warranted under the law in disturbing the judgment entered. The evidence offered on behalf of plaintiff tends to show that his car was traveling from eighteen to twenty miles per hour, while defendant's car was traveling at a speed of from thirty to forth miles. The evidence offered on behalf of the defendant tended to show that the defendant's car was being driven at from ten to fifteen miles per hour and that plaintiff's car was traveling at thirty to thirty-five miles per hour. In these circumstances the question was clearly one of fact for the trial judge. As stated by another division of this

court in Salmon v. Wilson, 227 Ill. App. 286, in speaking of Sec. 22 of the Motor Vehicle Act, (p.286) "While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching car may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection."

If, as the evidence tends to show, plaintiff's car was traveling at from eighteen to twenty miles per hour and was struck by the defendant's car which was coming at a much greater speed; and the collision took place near the north edge of the intersection, defendant cannot contend successfully that by virtue of the statute, he had the right of way and was not liable for any damage occasioned by the collision.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

333 - 29381

FRED J. BORNSEIF,

Appellee,

v.

DAVID LEVI,

Appellant.

237 I. App. 645

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $2500.00 rendered against him in an action for slander.

The record discloses that there was a former trial of this case where plaintiff had a verdict for $7,000.00 and after a remittitur of $2,000.00, judgment was entered in his favor for $5,000.00. An appeal was prosecuted to this court by the defendant where the judgment was reversed and the cause remanded. Bornseif v. Levi, 216 Ill. App. 535. The declaration was in three counts. At the close of all the evidence, the court, on motion of defendant's counsel, struck out the third count and the cause went to the jury on the first and second counts of the declaration.

The evidence tends to show that the defendant was the owner of an apartment building known as No. 3312 Perry Street, Chicago, which contained several apartments, occupied by a number of tenants, including plaintiff; that there had been a number of fires in the apartment building and that on the morning of January 12, 1913 there was another fire. De-

fendant was notified of this and went to the premises where a number of people were gathered, including police officers and firemen of the City of Chicago. Plaintiff and defendant met at that time and words passed between them, and it is the statements there made by the defendant concerning the plaintiff that he claims were defamatory and are the basis of his suit. It further appears that a few hours after the fire was extinguished, both plaintiff and defendant at the fire marshal's request, went to the fire marshal's office in the downtown district, where an investigation into the cause of the fire was made.

1. The defendant contends as stated by his counsel "The second count in seeking to hold the defendant liable for what took place in the fire marshal's office does not state a cause of action; and even if it does, there is no evidence sustaining it and the Court should have instructed the jury to find the defendant not guilty as to that count." The first two counts of the declaration are predicated on the slanderous words claimed to have been spoken by the defendant at the apartment building, while those charged in the third count are based upon what defendant said at the fire marshal's office. On the former appeal it was contended that the declaration did not state a cause of action, but this court speaking by Mr. Justice Barnes, held the contention untenable. The question, therefore, whether the first and second counts state a cause of action was determined on the former appeal and is not open for further consideration by this court. We might say, however, that we are entirely in accord with the holding on the former appeal in this respect. In support of the contention that even if the second count does state a

cause of action, there was no evidence to sustain it, it is said that the only damages claimed by plaintiff, were occasioned by his being taken to the fire marshal's office, and that plaintiff was taken to the fire marshal's office not as a result of the alleged defamatory words spoken by the defendant at the fire, but by the independent action of the fire marshal, for which the defendant was in no way to blame. We think the special damages claimed by plaintiff in the second count are not limited to what took place in the fire marshal's office, because in that count, plaintiff complains of the speaking of the defamatory words at the fire as a result of which he was injured in his business and good name which he bore among his friends and neighbors. And moreover, we are of the opinion that the jury might well find from the evidence that plaintiff was taken to the fire marshal's office as a result of the alleged slanderous words spoken at the building. The evidence tends to show that prior to the fire in question, and as a result of the prior fires, plaintiff had had the fire marshal looking into the matter of the former fires and when plaintiff charged the defendant with setting the fire in question, in the presence of a number of people, including police officers, the jury might well find that plaintiff was taken to the fire marshal's office as a result of what the defendant said.

3. The defendant further contends that there was a variance between the allegations of the alleged defamatory words and those testified to by the witnesses on the trial, and his motion to strike out such evidence should have been sustained. The words alleged to have been spoken by thedefendant were in response to plaintiff's statement to the

defendant, "This is fine protection you are giving us." The response as alleged is, "Why should I give protection to people who set my house on fire? You are the man that is responsible for this, and I repeat it again and again. I deliberatly accuse Mr. Dornseif of this and I am good for everything I say, and that is damn plain talk, isn't it, sargeant." Plaintiff testified in his own behalf as to what the defendant said to plaintiff at the building and as we read counsel for defendant's brief, there is no complaint that there was any variance between plaintiff's testimony and the allegations of the declaration. A number of other witnesses gave testimony on behalf of the plaintiff as to the statements made by the plaintiff to defendant at the fire, among them being a police officer, and there was no objection on the trial, nor is there here that the testimony of this witness as to the spoken words were variant from the allegations of the declaration. Nor was this question urged as to the testimony given by Ernest L. Downes, who testified on the same subject. Nor was the specific point of variance made until the close of plaintiff's case when counsel for defendant stated to the court "We move to strike out the testimony of John J. Benson and Ernest L. Downes and the testimony of each and every witness on the ground that they vary and depart from the language used in the first and second counts of the declaration." The motion was overruled and we think properly so because it is not contended that there was any variance so far as it concerned the testimony of some of the witnesses. Nor is there any contention that all of the testimony given by any of the witnesses was entirely variant from the allegations of the declaration.

It may be that some of the testimony of the witnesses as to the expressions made by the defendant did not come within the technical rule which requires not that the substance of the words alleged must be proved, but that the words alleged in the declaration, or enough of them to amount to the charge of the particular offense alleged to have been imputed must be substantially proved. Bangam v. McCurley, 140 Ill. 626; Newstedt v. Meyer, 158 Ill. App. 550. But we think that the variance, if any, in this respect would not warrant a reversal of the judgment. Moreover, the claimed variance was not pointed out by counsel which the law requires. City of Chicago v. Wieland, 139 Ill. App. 187; Ainslie v. Biggs, 211 Ill. App. 462.

3. A further contention is made that the evidence as to how plaintiff felt during the examination at the fire marshal's office and in consequence of such examination, as well as the evidence of plaintiff's fears, trembling, insomnia and medical treatment should have been excluded and that the evidence as to what defendant said at the building in the hearing of the police sargeant should have been excluded, because it was privileged, the officer being at the premises for the purpose of investigation because of the fire. As to the evidence concerning what was said in the presence of the officers being privileged, this court on a former appeal, decided that what defendant said at that time was not privileged and, therefore, that question has been determined. And the fact that in the record before us there is evidence tending to show that the officer was there to investigate the cause of the fire, does not change the situation because what the de-

fendant said was spoken to plaintiff. We are also of the opinion that the evidence as to how plaintiff felt and that he was troubled with insomnia as a result of the accusations made was not improper. O'Malley v. Illinois Publishing & Printing Co., 194 Ill. App. 544. Defendant testified in his own behalf and denied that he had charged plaintiff with having set the fire and the evidence in the record tends to show that there was considerable excitement at the time the defendant spoke the words and that what defendant said was in the heat of passion and not premeditated. This, however, would only go to mitigate the damages. McKee v. Insalls, 5 Ill. (4 Scam.)30; White v. Bourguin 204 Ill. App. 83. We think the evidence discloses that defendant had considerable provocation at the time in question, occasioned by what plaintiff said to the defendant, viz. "This is fine protection you are giving us." But the defendant requested no instruction, to the effect, that the jury might take into consideration the fact that, if they found it to be such, the words were spoken by the defendant in the heat of passion. We cannot say upon a consideration of the entire record that the verdict is excessive. The words spoken, if the jury believed them to be as plaintiff testified, charged plaintiff with the crime of arson. Barnes v. Hamon, 71 Ill.609

4. Complaint is made by the defendant to the giving of instruction No. 2 on behalf of plaintiff. This instruction seems to have been copied from the case of Ilas v. Swank,202 Ill. 453, which was an action of slander and where it was held proper. We think it was a proper instruction to be given in the instant case. The third instruction given by plaintiff and of which defendant complains, told the jury that in estima

ing the amount of damages, they might take into consideration the pecuniary circumstances of the defendant. We think this question was determined by this court on the former appeal, because the first judgment in plaintiff's favor was reversed by this court for the sole reason there was no proof of defendant's pecuniary ability. Nor was there any error in the plaintiff's fourth instruction by which the jury were told that where slanderous words are actionable per se, plaintiff was not required to prove express malice to entitle him to recover. And they were fully advised in another instruction as to the meaning of the legal terms used in that instruction. The seventh instruction defined the crime of arson in the words of the criminal code; much of this had no application to the burning of a dwelling house or an apartment building, but refers to other kinds of property. We think also that that part of the statute which stated the punishment for persons who committed arson to be imprisoned in the penitentiary for a term of not less than one year or more than twenty years; and should the life of any person be lost in consequence of such fire, the offender shall be deemed guilty of murder and punished accordingly, was inapt. There was no evidence that any one had lost their life in the fire, and therefore, that part of the statute should have been omitted from the instruction. But since there is little dispute but that plaintiff uttered the words alleged in the declaration, and since we have held that the verdict is not excessive, we think we ought not to disturb the judgment on account of the giving of this instruction.

5. The declaration alleges that the defamatory words were spoken on the 13th day of January, 1913. The in-

stant case was brought on May 23, 1913. On June 17, 1913, the defendant filed a plea of not guilty. The first trial of the case was not had until some years thereafter and the judgment rendered on that trial was reversed by this court, December 31, 1919. The cause was not re-docketed until November 12, 1920. On October 3, 1922, the defendant asked leave to file a plea of justification, which the court denied. The case did not go to trial the second time until the 17th day of September, 1923, about twelve months thereafter. The motion to file the plea was denied and the defendant contends that the denial of its motion was error and the case of Goldstein v. Chicago City Ry. Co., 226 Ill. 397, is relied upon. That case was an action brought under the Injuries Act and long after the pleadings were settled, the defendant asked leave to file a plea of the Statute of Limitations, setting up that the cause of action was not commenced within one year after the death of the injured person. Prior to the time the defendant asked this leave, it had at two other times attempted to file a plea of the Statute of Limitations, but each was not in proper form. The trial judge refused to allow the plea to be filed and this was held erroneous by the Supreme Court. The court there held that the provisions of the Injuries Act, requiring the suit to be brought within one year after the death of the injured person, was not a mere Statute of Limitations effecting the remedy, but was a condition of liability. The court further held that when issue has been joined and after considerable delay, application is made for leave to file a plea interposing a defense not before pleaded, the application is addressed to the sound discretion of the court and where an

unfair advantage would result to the defendant from such an allowance, the application might properly be denied. But the court there said (p.301) "No such situation was here presented when the application was made * * *. The proposed plea set up no fact as a defense which was not known to plaintiff or which would have placed her at a disadvantage in presenting her case." We think that case is distinguishable from the case at bar. There the plea which was sought to be filed showed that the plaintiff was without any cause of action when she commenced her suit, because it was more than a year after the death of the injured person, so that no defense could have been brought into the case by the plea that was not known to the plaintiff and would not have placed the plaintiff at a disadvantage, while in the instant case, leave to file the plea was not asked until about ten years after the occurrence. Many witnesses might have disappeared or died which otherwise might have been available to plaintiff had he known such defense was to be interposed and since defendant made no showing as to why he had not filed this plea sooner, we are unable to say that the court abused its discretion in denying the motion.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

241 - 29330

MORRIS LIPSCHULTZ,

Appellant,

v.

SECURITY TRUST & DEPOSIT CO., a corp.,

Appellee.

237 I.A. 645

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff sued the defendant in assumpsit to recover for money and jewelry claimed to have been lost through the negligence of the defendant. There was a verdict and judgment in defendant's favor and plaintiff appeals.

The record discloses that plaintiff rented from the defendant a safety deposit box in which he claimed to have placed $11,300.00 in money, and jewelry of the value of $900.00, all of which he alleged had been forcibly taken from the box by burglars, and plaintiff's position was that the defendant failed to exercise ordinary care in the conduct of the safety deposit vault in which plaintiff's box was located.

The relation between plaintiff and defendant was one of bailment and in the absence of a special contract, the defendant, under the law, was bound to exercise ordinary care in protecting plaintiff's property. It was bound to exercise "such care and diligence in the preservation of the property entrusted to it as every prudent man takes of his

own goods of like character". Schaefer v. Safety Deposit Co., 261 Ill. 43. And where, as in the instant case, the undisputed evidence shows that the box which plaintiff had rented was in the exclusive control of the defendant and plaintiff could not obtain access to it, except by giving his key to the person in charge of the vaults, the rule of law is that where a bailee receives property and fails to return it, the presumption arises that the loss was due to its negligence, and imposes upon it the burden of showing that it exercised the degree of care required by the nature of the bailment. Schaefer v. Safety Deposit Co., supra. But it is also the law that where the failure to deliver, in such case, is explained by the fact that the property bailed has been lost, stolen or destroyed by fire, the presumption of negligence arising from the failure to deliver the goods is overcome and the onus or burden of proving negligence on the part of the defendant passes to the plaintiff. Nichols v. Union Stock Yards & Transit Co., 193 Ill. App. 14. Becker Co. v. Ottawa Pianophone Co., 217 Ill. App. 49. Under the law as above stated, we think plaintiff made out a case for the jury and the question whether the defendant had exercised the degree of care imposed on it by the law was one of fact for the jury. Grossman Shoe Co. v. Security Trust & Deposit Co., No. 28813 Appellate Court, First District. But plaintiff contends that the verdict and judgment were wrong because the jury were improperly instructed and in this connection complaint is made to instructions Nos. 1, 3, 4, 6 and 7, given at defendant's request. We think the contention of plaintiff's must be sustained, that the instructions complained

of were erroneous and the giving of them prejudicial to plaintiff.

Instruction 1 told the jury that, before they could find for the plaintiff, he must prove by a preponderance of the evidence all the "material facts alleged" including certain specific facts. And by instruction No. 4 the jury were told that, if they believed the evidence as to the "material issues" was equally balanced or preponderated in favor of the defendant, they should find for the defendant. It has been repeatedly held that an instruction authorizing a verdict, if the jury believed from the evidence, that the material allegations have been established by the evidence, is erroneous in leaving the jury to determine what allegations are material. Baker & Reddick v. Summers, 201 Ill. 53; Laughlin v. Hankinson, 202 Ill. 80. The jury were not told what the material facts or issues were. Both of these instructions were erroneous and should not have been given.

By instruction No. 3 the jury were told that it was not the duty of the defendant to provide an armed force of sufficient strength to repel a burglary or robbery committed by persons armed with deadly weapons; that the defendant had the right to conduct its business and protect its patrons with such a number of employes as were necessary for the ordinary protection of the goods left with it, and that the defendant had a right to rely upon the protection afforded by the City of Chicago and the civil authorities of the County of Cook, through the use of policemen and deputy sheriffs. This instruction is bad for a number of reasons. It in effect told

the jury that the defendant was not required to provide enough guards to prevent a robbery. It also told the jury substantially the same thing in another way, by advising the jury that the defendant, under the law, was only required to furnish such number of employes as were necessary for ordinary protection. And it was further erroneous in telling the jury that the defendant had a right to rely upon the police force, and deputy sheriffs. The test of liability in this case was whether the defendant had exercised reasonable care for the safe keeping of plaintiff's property and what constitutes reasonable care depends upon the particular circumstances in each case. As said in the case of the Masonic Temple Safety Deposit Co. v. Longfelt, 117 Ill. App. 652, "A safety deposit company holds out to the public the implied agreement that property placed in its custody will be protected, so far as reasonable human foresight will permit, from the ordinary dangers to which valuables, whether in the shape of money, bonds, jewelry or other forms, are exposed, through the cupidity and daring of those who, as experience shows, are always on the lookout to possess themselves of the property of others by fraud or criminal violence." Every one knows that boxes in a safety deposit vault are supposed to contain valuables and it is also well known that a company conducting such business is expected to use such care to protect the property entrusted to them as the circumstances require. No one would deposit valuables in such a place if it was understood that the deposit company was relying upon the police force or deputy sheriffs to protect property. Such officers are not

supposed to perform such duties except when they are notified that a burglary or robbery is about to be committed.

Instruction No. 6 told the jury that, under the law, the defendant was required to use such diligence for the protection of property entrusted to it that a reasonably prudent person could exercise under the circumstances "and if it appears that the articles in question * * * were taken * * * from * * * the defendant * * * by superior force and violence, and while the defendant was exercising reasonable and ordinary care for the protection of the property, and not on account of the failure on the part of the defendant to exercise ordinary care in that regard and not withstanding the use of such reasonable care and diligence on the part of the defendant, your finding should be for the defendant." This instruction is involved and apt to be misleading. The jury ought to be told only that the defendant could not be held liable if the jury believed from the evidence that it exercised ordinary care to protect the property.

By Instruction 7 the jury were told that if they believed from the evidence any witness had been "successfully impeached" or had knowingly and wilfully testified falsely to any material fact, then they were warranted in disregarding such testimony, except so far as the witness had been corroborated by other credible evidence. An instruction similar to this was condemned in the case of Chicago City Ry. Co. v. Ryan, 225 Ill. 287.

Plaintiff contends that the court erred in refusing to give instruction No. 2 requested. By this refused instruc-

tion plaintiff sought to have the court tell the jury "that it makes no difference" whether the evidence as to the use of reasonable diligence by defendant to protect plaintiff's property came from witnesses called by the plaintiff or those called by the defendant. We think there was no error in refusing this instruction. Of course, the jury were required to pass upon the question of the defendant's diligence or lack of diligence from all the evidence. The phrasing of the instruction is not well done, but this may be obviated upon a retrial of the case.

As to the objection made by plaintiff to the ruling of the court in regard to the question put to the witnesses Jonas and Allaby, we think it sufficient to say that the defendant was within its rights in asking Jonas whether he felt friendly or otherwise toward the defendant and the ruling of the trial judge was, in our opinion, correct. On the question asked Allaby as to his experience, we think the court should have permitted the witness to answer. The other question as to whether the witness would have admitted four strangers was merely calling for an opinion and the court was correct in sustaining an objection to it.

For the errors in the giving of the instructions, the judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

253 - 33341

H. H. KRUEGER, ET AL, Trading as Advertising Metal Display Company, Appellees,	APPEAL FROM
v.	MUNICIPAL COURT OF CHICAGO.
JOHN REINER, Trading as Reiner Specialty Manufacturing Company, Appellant.	

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendant to recover $1289.25, claimed to be thebalance due them of the purchase price for 1,000 metal display stands. At the close of all the evidence, there was a directed verdict in plaintiffs' favor for the amount of their claim. Judgment was entered on the verdict and the defendant appeals.

The record discloses that on April 8, 1923, the defendant was engaged in business at No. 417 South Dearborn street, Chicago, under the name of Reiner Specialty Manufacturing Company and had in his employ one J. P. Downes. On that date the plaintiff Krueger called at defendant's place of business and was introduced to Downes, Reiner was not there at the time. Downes exhibited to Krueger a sample of "lithographing metal display" which had been made up by another company and asked Krueger to submit a bid as to how much he would make up one thousand of them for the de-

fendant. Thereupon Krueger apparently went to his place of business and figured that plaintiffs could make the 1000 metal display stands for $1.35 each. He then returned to defendant's place of business, according to his testimony, advised Downes of this fact, and then wrote out in duplicate an order which was signed by himself as salesman representing plaintiffs, trading as Advertising Metal Display Co. and "by J. P. Downes, buyer." This order is partly printed and partly in writing. It provides "Please enter order as follows: Name - Reiner Specialty Mfg. Co., 417 South Dearborn Street - 1000 Gauge No. 26 Metal Display Stands, same as sample submitted, with wood back and iron brackets, lithographed in three colors. Same as sketch." It further provided that the first shipment of the stands was to be made about May 4, 1923, and the price, $1.35 each. "All to be taken out in one year from date of order or sooner, only billing for same as you order them shipped." Then follows some printed matter, one paragraph of which is "Should the buyer fail to make prompt payment on any installment of this order according to the terms hereof, the Advertising Metal Display Co. shall have the right to make immediate delivery of all remaining installments and the unpaid balance of the entire purchase price shall be immediately due and payable. * * * This order is accepted subject to the approval of the Advertising Metal Display Co., who shall not be bound by any verbal agreements (not herein mentioned) between the buyer and salesman." The terms were thirty days net, two percent off for cash in ten days from date of invoice.

The evidence further tends to show that on the next day, April 7th, plaintiffs sent to the defendant, an accept-

ance of the order, part of which is in typewriting and the balance in printing. It substantially follows the order of April 6th and states that plaintiff sold to the defendant 1000 metal display stands, No. 26 at $1.35 each. The first shipment to be made May 4, 1922, and all the stands to be taken out one year from date of order or sooner. At the bottom in print appears the following: "ACKNOWLEDGMENT TO CUSTOMER - IMPORTANT - PLEASE READ."

This is a carbon copy of the order placed in our factory for execution, and constitutes a description, which is our understanding of your requirements. If it does not conform in every way to your understanding and wishes, notify us AT ONCE." Then follows other printed matter, but the quoted paragraph in the order of April 6th to the effect that in case the buyer fails to make prompt payment of any installment, plaintiffs have the right to make immediate delivery of all the remaining installments and that the entire purchase price shall then become due immediately, is omitted; nothing of that sort appears in the document of April 7th. Defendant testified that he never saw the written order of April 6th, signed by Downes until after he was sued in the instant case.

The record further shows that plaintiff made deliveries as follows: June 11th - 26 stands; July 7th - 25 stands; July 23rd - 20 stands; September 17th - 884 stands. The evidence further tends to show that defendant did not make payments promptly and Krueger called up defendant a number of times demanding payment. On August 30th he went to defendant's place of business and was then given $67.30

by the defendant, being the first and only payment made; that afterwards on September 17th, the defendant delivered the remaining number of stands of 884 and demanded payment for all the stands less the $67.50. The evidence further tends to show that the defendant shortly thereafter returned the 884 stands to plaintiff, although there is some dispute on this point.

Plaintiff takes the position that under the terms of the order of April 6th, they were expressly authorized to deliver the 884 stands, being the balance of 1000 stands then not delivered and demand immediate payment of all of them. On the other hand the defendant's position seems to be that he knew nothing about this provision in the order of April 6th and that he had a year to order out the 1000 stands. He further takes the position that Downes was not authorized to order the goods in his behalf. A number of points are argued on both sides, but in the view we take of the case, they become immaterial, because we are of the opinion that when plaintiffs specifically stated in the written acceptance of the order on April 7th, that the acceptance was "a carbon copy of the order placed in our factory for execution and constitutes a description, which is our understanding of your requirements. If it does not conform in every way to your understanding and wishes, notify us at once." They ought not now be permitted to ~~and~~ shift their position and say that the order contained other and different provisions and especially in view of the fact that the defendant testified that he had not seen the order of April 6th until after suit was brought. It will be noted

that in the acceptance of April 7th, it is specifically stated that that document is a carbon copy of defendants order, given to plaintiffs and that if it did not conform in every way to defendant's understanding and wishes, he should notify plaintiffs at once. By the terms of this document of April 7th defendant had a year in which to order out the 1000 stands and after being warned by the plaintiffs to read that document of April 7th carefully as it was a carbon copy of the defendant's order, they should not now be permitted to take advantage of the printed paragraph in the document of April 6th, providing that plaintiffs might in case prompt payment was not made, deliver the remainder of the 1000 stands and demand payment of all at once. This paragraph in the document of April 6th appears to have been inserted to entrap the unwary, especially when it is considered in connection with the document of April 7th. If the document as plaintiffs state is a carbon copy of defendant's order, by the terms of which defendant was given a year in which to order out the 1000 stands, he could not be compelled to take them sooner.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

263 - 29352

MOTOR CAR SECURITIES CORPORATION,
Appellee,

v.

C. A. MILLER,
Appellant.

237 I.A. 645

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On November 13, 1923, judgment by confession, based upon a promissory note, was rendered in favor of the plaintiff and against the defendant for $758.23. On December 13, 1923, the defendant made a motion, supported by affidavit, to open up and vacate the judgment and for leave to defend. The motion was denied and the defendant appeals.

Defendant in his affidavit in support of the motion to vacate, set up that on the 28rd of April, 1923, he purchased from the Triangle Motors, Inc. a Haynes No. 57, Sport Model automobile, which was to be fully equipped and to carry a guarantee the same as though it were a new car; that on that date he paid the Triangle Motors, Inc. the sum of $581.35 on account of the purchase price and executed his notes to that corporation for the balance of the purchase price, $1162.85, the payment of which was secured by chattel mortgage; that part of the notes were the ones on which the judgment by confession was entered. The affidavit further set up that the automobile delivered to him was a Haynes, No. 55, Sport Model of the year 1923, and that the roadster, No. 57 which

the Triangle Motors, Inc. contracted to sell him was a 1923 model; that at the time he made the purchase of the automobile, the seller of it reported to him that it was a demonstrating car almost new and had been driven about 300 miles; that the car delivered to him had traveled about 4000 miles and was considerably worn. The affidavit further sets up that "several months" after the car was delivered to him, he discovered that it was not the car he had purchased and upon such discovery, he tendered the car back and demanded the return of his money and notes, which demand was refused.

The defendant contends that since the notes in question show on their face that they were secured by a chattel mortgage, he had the same defense against plaintiff as he would have had against the payee of the note, the Triangle Motors, Inc. We shall assume that this is a correct statement of the law for the purpose of this opinion. An affidavit in support of a motion to vacate a judgment is construed most strongly against the moving party, and in the instant case we think the affidavit was insufficient to warrant the court in vacating the judgment. The affidavit sets up that several months after the car had been delivered to the defendant, he discovered that it was not the car he had purchased. There is no averment in the affidavit that he could not have discovered that the automobile was not the one he purchased long prior to the time he claims to have done so. The affidavit fails to show that he used any diligence in this respect.

The affidavit was clearly insufficient and the order of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

272 - 39361

CLARA E. HARDWELL,

Appellee,

v.

CITIZENS TRUST & SAVINGS BANK, a corp.,

Appellant.

237 I.A. 646

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff sued the defendant to recover the value of a diamond ring, a diamond stud and an unset diamond, claiming that she had delivered them in a satchel for safe keeping to the defendant; that when the satchel was returned to her, the diamonds were missing. There was a verdict and judgment in plaintiff's favor for $450.00 and the defendant appeals.

Plaintiff in her statement of claim alleged that on June 30, 1921, she delivered to the defendant for safe-keeping a satchel which contained a small box in which she had placed one ring set with three diamonds, valued at $950.00, one diamond stud of the value of $450.00 and one unset diamond of the value of $450.00. On August 15, 1922, the satchel was returned to her, but the diamonds were missing.

Defendant in its affidavit of merits set up that they had received the satchel from the plaintiff, but denied that any diamonds had been removed from it while the satchel was in its possession and denied that it failed to use ordinary care in keeping the property.

The evidence tends to show that on June 30, 1921, plaintiff took the satchel to the defendant bank for safe-keeping for which it was to be paid fifty cents per month; that the diamonds in question were placed in a small box and put in the satchel; that at the time plaintiff left the satchel at the bank she was given a receipt or slip which she was to present when she called for her property; that on August 15, 1922, she went to the defendant bank and paid it $6.50, being the amount charged by the defendant, surrendered up the slip which had been given to her when she left the satchel and the satchel was returned to her; that she then went to her home, a block or two from the bank, but was unable to open the satchel because the keys she had would not unlock it; that she then went to a nearby locksmith from whom she procured a key, returned to her home and then unlocked the satchel; that she noticed the satchel seemed to have been sprung open at one place and the little receptacle in which the diamonds were placed appeared to have been tampered with and the diamonds were missing; that within an hour after she had received the satchel from the bank, she returned to the bank and advised it of the fact that the diamonds were missing. The evidence further tends to show that the satchel was placed in defendant's vault. Defendant offered evidence tending to show that they had used due care to protect plaintiff's property while was in their possession. Plaintiff also offered evidence tending to show that the value of the ring was $300.00 and the diamond stud $150.00. No evidence was offered as to the value of the unset diamond. The cause was submittedtto the jury and they returned a verdict in favor of plaintiff for $450.00.

1. The defendant contends that the court erred in

refusing to admit in evidence a document which was signed by plaintiff and a representative of the defendant when the satchel was received on June 30, 1931. It is contended that this document was the written agreement between the parties and that it had printed on the back a provision to the effect that the defendant was liable in case of loss only for wilfull negligence. We think there was no error in the ruling of the court in excluding this document. It did not purport to be a contract between the parties, but on the contrary, stated on its face "I hereby state that I have removed the package held by the Citizens Trust and Savings Bank and have surrendered and returned the check; and I hereby acknowledge that the lease issued to me for said package has been cancelled; and I hereby release the Citizens Trust and Savings Bank of and from all claims and demands against it to date." It is clear that this was not a contract between the parties. There was no dispute but that plaintiff delivered the satchel to the defendant as she testified and a witness for the defendant gave testimony to the same effect.

2. It is next contended, that on the merits of the case, the defendant was in no way liable because the evidence shows that it was guilty of no negligence. We have examined all the evidence in the record and are clearly of the opinion that the evidence does indicate that the defendant was negligent in the care it exercised of plaintiff's property. Plaintiff told a straight forward convincing story and in fact there was very little dispute as to any of the evidence she gave. We certainly would not be warranted in finding that the verdict of the jury who heard the witnesses testify and observed

their demeanor and found in plaintiff's favor, was against the manifest weight of the evidence. On the contrary, we think all the evidence sustains plaintiff's version of the matter.

3. It is next contended that the court erred in refusing to give an instruction requested by the defendant. By this instruction the defendant sought to have the court tell the jury that before plaintiff was entitled to recover, she was required to prove by a preponderance of the evidence three propositions - that the articles claimed to have been lost or some of them were in the satchel at the time she delivered it to the bank for safekeeping (2) that they were not in the satchel when she received it from the bank and (3) that there was negligence on the part of the defendant in keeping the satchel and its contents. The relation between plaintiff and defendant was one of bailment and in the absence of a special contract, the defendant, under the law, was bound to exercise ordinary care in protecting plaintiff's property. And it has been held by our Supreme Court that in such circumstances the defendant is bound to exercise such care and diligence in the preservation of the property entrusted to it as every prudent man takes of his own goods of like character. Schaefer v. Safety Deposit Co., 281 Ill. 43. And where, as in the instant case, the undisputed evidence shows that the satchel which plaintiff left with the defendant was in the defendant's exclusive control, and plaintiff could not obtain access to it, except by returning the slip which had been given to her by the person in charge of this particular part of defendant's business, the rule of law is that where a bail-

es receives property and fails to return it, the presumption arises that the loss was due to its negligence and imposes upon it the burden of showing that it exercised the degree of care required by the nature of the bailment. Under this law all that plaintiff was required to do to make out a prima facie case, was to prove that the jewelry was in the satchel when she delivered it to plaintiff and that it was not there when the satchel was returned to her. When she did this, the law presumed negligence on the part of the defendant and the refused instruction was erroneous in requiring plaintiff to prove, in addition, the fact that the defendant was guilty of negligence in keeping the satchel. Upon a carefub consideration of the entire record, we are clearly of the opinion, that the verdict of the jury ought not to be disturbed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

294 - 28273

N. LAPIDUS, ET AL,
Doing business as
N. Lapidus & Sons,

Appellees,

v.

WESTERN WAREHOUSING
COMPANY, a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendant to recover damages claimed to have been sustained by them as a result of the freezing of potatoes which they had stored in the defendant's warehouse. There was a verdict and judgment in plaintiffs' favor for $4,000.00 and the defendant appeals.

The record discloses that on November 21, 1922 and 24, 1919, plaintiffs stored nine carloads of potatoes in the defendant's warehouse. On December 10th there was a severe cold spell, the thermometer registering eight degrees below zero and on the morning of December 11th, plaintiffs claim to have discovered that the potatoes were frozen. Afterwards the potatoes were sorted and it was found necessary to throw away 71,286 pounds, because they were frozen and it is to recover for the loss of these potatoes that plaintiffs brought suit. It further appears from the evidence that the defendant's warehouse had recently been constructed and was first opened about September, 1919; that there

was no means for heating the warehouse; that plaintiffs knew of this fact and also knew that a rule of the defendant provided that "Perishable goods or others susceptible to damage or decay through changes of temperature shall be accepted only at owner's risk." It further appears from the evidence that on the 11th of December, 1919, plaintiffs told the defendant that the potatoes were frozen and a day or two thereafter defendant placed some oil stoves on the floor where the potatoes were stored to prevent further freezing. Plaintiffs offered evidence tending to show that the potatoes were in good condition when they were placed in the warehouse and that on the morning of December 11th some of the windows of the warehouse, which opened on to the floor where the potatoes were stored, were open, although the weather was very cold and that that fact caused the damage in question. On the other hand, the defendant's position was that the potatoes were not in good condition when they were placed in the warehouse; that they were frozen before that time. And the defendant's further position is that the windows were opened to equalize the temperature in the room where the potatoes were stored with that on the outside. The temperature on the outside being warmer than inside.

On the trial of the case, at the close of all the evidence, the learned trial judged stated that under the evidence there was no obligation on the defendant to furnish heat in the warehouse. He further stated "I am only permitting this case to go to the jury on the theory that there is some negligence on account of leaving the windows

open." As there must be a re-trial of the case on account of the fact that the instructions did not clearly present the issues involved to the jury, we will refrain from discussing the evidence in detail, yet we think we ought to say that there was ample evidence for the jury to find that the potatoes were in good condition when they were placed in the warehouse.

The relation existing between plaintiffs and defendant was one of bailment for hire and in the absence of a special contract the defendant, under the law, was bound to exercise ordinary care in protecting plaintiffs' potatoes. It has been held that in such circumstances, the defendant is bound to exercise "such care and diligence in the preservation of the property entrusted to it as every prudent man takes of his own goods of like character." Schaefer v. Safety Deposit Co., 281 Ill. 43. And this rule of law has not been changed so far as we are advised by any of the provisions of chapter 114, which chapter has to do with warehouses. In the instant case since the undisputed evidence is that there were no facilities for heating the warehouse and that plaintiffs knew of this fact before the potatoes were stored in the warehouse, the defendant would not be liable for any damage occasioned by the freezing of the potatoes on account of the lack of heat. But if it appears that the potatoes were frozen by reason of the fact that the defendant left the windows open, then it is obvious that the defendant would be liable, and in the record before us, the only questions for the jury to consider were whether the potatoes were in good condition when they were put in the warehouse and whether they were

frozen on account of the windows being opened by the defendant. We think the instructions did not clearly present these questions to the jury.

The defendant contends that the court erred in giving instructions 1, 2, 6 and 7, at the request of plaintiffs. The objection to instructions 1 and 2 is that they refer the jury to the declaration. It has been held that such instructions, though not good practice, would not warrant the reversal of a judgment. Bank Bros. Coal Co. v. Thil, 228 Ill. 233; Central Ry. Co. v. Bannister, 195 Ill. 48; West Chicago R. R. Co. v. Liesrvvita, 197 Ill.607. By instruction 6 the jury were told that a warehouseman under the law of this state, was liable for loss to goods stored, which loss was occasioned by the failure of the warehouseman to exercise reasonable care in the preservation of them. The objection to this instruction is that it was inapplicable because in the instant case there was a special contract between the parties. Instruction 7 advised the jury as to certain provisions of the statute in relation to warehouses. These instructions should not have been given because, as above stated, the law required the defendant to exercise reasonable care to preserve the potatoes and this obligation was not effected by the statute. On a retrial of the case, the jury should be instructed as we have indicated. The defendant further contends that the court erred in refusing to give certain instructions requested by it. In view of what we have already said, it will be unnecessary to pass upon these offered instructions, except that we think the court should

have given No. 3 by which it was sought to have the court tell the jury, among other things, that defendant was not required to maintain artificial heat to prevent the potatoes from freezing.

The defendant also contends that since one of defendant's rules provided that all claims for loss or damage should be made within "thirty days after the delivery of merchandise from warehouse" and since plaintiffs' claim had not been made within that period of time, as we understand the argument, it is barred. We think there is no merit in this point, because the evidence discloses that immediately after the potatoes were frozen on December 10th or 11th, plaintiffs began to resort the potatoes and to remove them from the warehouse and the last of the potatoes were removed on March 4, 1930, and it appears that plaintiffs made a claim on March 1st, three days before. It is clear that if the rule in question formed a part of the contract between the parties, plaintiffs claim was made within the prescribed time.

It is true that the court instructed the jury that if they found from the evidence, that at the time the contract for storage was made between the parties, the defendant had no facilities for heating the warehouse and this fact was known to the plaintiffs, then the defendant was under no duty to provide heat. But this instruction might have misled the jury in that they might have found that the defendant had "facilities for heating its warehouse" because a few days after the potatoes were frosted it procured oil stoves. The undisputed evidence is that the defendant had no facilities

for heating the warehouse and this was known to plaintiff prior to the storage of the potatoes, and therefore, defendant was not obligated to procure the oil stoves or any heat for the warehouse. The issues involved were not presented to the jury in such a manner that they could intelligently pass upon them.

We think there was no error in the ruling of the trial judge in reference to the testimony given by Jacob Lapidus and Samuel Ezenberg in regard to the condition of the potatoes. Nor was there error in permitting the witness McCarthy to give testimony as to when the cars were at the 40th street yard of the railway company. Of course, the original way bill might have been produced, but the rule as to what is the best evidence in this respect is so well known to counsel for both sides that we feel no error will occur upon a re-trial of the case in this respect. We might say, however, that the error, if any, on the admission of evidence was of such a character that it would not warrant us in disturbing the judgment, if the record were otherwise free from serious error.

For the failure of the instructions to present the issues clearly to the jury, the judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

303 - 29403

SARAH V. MEYNERS,
Appellee,

v.

ARTHUR O. MORTIMER,
Appellant.

APPEAL FROM
THE MUNICIPAL COURT
OF CHICAGO.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment of $495.00 entered against him by confession.

The record discloses that on April 1, 1921 plaintiff and defendant entered into a written lease whereby certain premises were demised to the defendant for a period beginning May 1, 1921 and ending April 30, 1924, at a rental of $14,400.00, payable in monthly installments in advance and during the last year of the term the rent was $475.00 per month. The property was to be occupied for foundry purposes. On the 7th day of April, 1921, being six days after the lease had been executed, the lessee, with the consent of the landlord, assigned all his rights, title and interest in the lease to the Mortimer Foundry Co. and to himself A. O. Mortimer. It was expressly agreed, however, that the lessee should remain liable for the payment of the rent.

On November 28, 1923, the judgment by confession was entered in favor of plaintiff and against the defendant,

lessee, for the rent for the month of November, $475.00, plus $20.00 for attorney's fees, making a total judgment of $495.00. On December 11th following, the defendant filed his petition and moved the court to vacate the judgment and permit him to defend. The motion was allowed and the petition ordered to stand as the defendant's affidavit of merits. The matter then came on for hearing before the court without a jury and there was a finding against the defendant and the judgment theretofore entered was confirmed and held to be in full force and effect.

The evidence tends to show that there were two riders attached to the lease, whereby it was provided that plaintiff was to make certain repairs, some of which were to be done prior to the beginning of the term May 1, 1921, and as to the others, the time was not specified. On the hearing before the court, the defendant testified in his own behalf to the effect that the premises in question were occupied by the Mortimer Foundry Company, a corporation, of which he owned all the stock, but two shares, one share being held by his wife and the other share by a third party, and that he and his wife were officers of the company. His testimony further tends to show that none of the repairs which plaintiff had agreed to make were done prior to May 1, 1921, but that thereafter some of them were made by the plaintiff, some of which were done in a negligent manner and some of the repairs specified to be made by the plaintiff were not made at all. The testimony of this witness further tends to show that the foundry company occupied the premises and conducted its business therein until November 1,

1923, when it vacated the premises and moved into its own property. He further testified that during the entire period, the foundry company occupied the premises, rain came through the roof and other portions of the building occasioned by the failure of plaintiff to make the repairs specified, and that, as a result, the foundry company from time to time was unable to conduct its business and thereby sustained loss and that some of its personal property was also damaged by the rain.

The defendant contends that there was a constructive eviction occasioned by plaintiff's failure to make the repairs called for by the lease as well as under the law, since it was plaintiff's duty to repair the roof to prevent rain coming into the premises, all of the building not being occupied by the defendant or the foundry company, and that on account of the building being out of repair, which permitted the rain to come through the roof and through portions of the building, it was rendered untentable so that it was necessary to vacate the premises on November 1, 1923. The defendant's further position is that he was entitled to recoup the amount of damages he sustained by reason of the rain coming into the premises, damaging some of the property and causing loss of time. Assuming that it was plaintiff's duty to keep the premises in a tentable condition; that she failed to do so and as a result thereof, the defendant was compelled to vacate the premises on November 1, 1923, this would amount to constructive eviction, and the defendant would not be liable for rent after

that date. Gibbons v. Hoefield, 29[illegible] Ill. 455. And if the defendant's property was damaged as a result of plaintiff's failure to maintain the premises in a tenantable condition, he would be entitled to recoup his damages, although he had not vacated the premises. Selz v. Stafford, 324 Ill. 610. But we think the evidence does not warrant the conclusion that it became necessary to vacate the premises because they were untenantable, because the defendant himself testified that when the premises were vacated on November 1,1923, the foundry company moved into its own property and that afterwards he took the matter up with the plaintiff and discussed the question of securing another tenant for the premises and stated that if a new tenant were obtained for less than the rent of $475.00, called for in the lease, the defendant would pay the balance. No explanation is made why the defendant was willing to do this, and we think the court was fully justified in finding that the premises were vacated by the foundry company for the reason that it had its own property and not for the reason that it was untenantable. Nor do we think there was any basis in the evidence to warrant any allowance on the ground of recoupment for two reasons: (1) a careful consideration of the entire record discloses that the premises were occupied solely by the foundry company and not by that company and the defendant, and, of course, any damages sustained by the foundry company could not be recouped in an action against the defendant lessee. By the expressed terms of the assignment of the lease, the defendant as lessee, was still liable for the rent; and (2) no allowance could be made on the ground of recoupment, because the damages claimed to have been sustained are entirely too indefinite in amount and were nothing

more than a mere surmise or estimate at the most. When pressed by the court as to how much he claimed for damages to personal property, he estimated the loss from $1,000.00 to $1,500.00. His testimony further shows that he estimated his loss from $300.00 to $350.00 on account of rain coming through the roof. It is obvious upon a careful consideration of all the evidence in the record that the testimony given by this witness is of so uncertain a character as not to form the basis for the allowance of any damages in the nature of recoupment.

But the defendant contends that he had three other witnesses who would testify in his behalf, but which the court refused to hear. We think the court should have permitted the witness to testify, but we are also of the opinion that any error in this respect would not warrant us in reversing the judgment, because it appears from the record that these witnesses would testify to substantially the same facts as those testified to by the defendant. And while the defendant contends that the record discloses that the testimony of these witnesses would supplement that given by the defendant, we think the record discloses that the testimony of these witnesses as disclosed by statement of counsel, would not be materially different from the testimony of the defendant. We are also of the opinion that plaintiff could maintain her action against the defendant lessee alone without joining the Foundry Company, because the tenant remained liable after the assignment of the lease.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

147 - 29383

HARRIET HERRICK,

Appellant,

v.

ROBERT HERRICK,

Appellee.

237 I.A. 646

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

We have this day filed an opinion in the case of Herrick v. Herrick, No. 29382, wherein we set forth the agreements made between the parties, the provisions of the decree of divorce entered in favor of the complainant and against the defendant and the order of the court reducing the amount of alimony and modifying the decree in other respects. After the proceedings were had, as stated in that opinion, the defendant, on March 7, 1924, filed a petition in the divorce proceedings, wherein he set up a provision of the supplemental agreement mentioned in the opinion filed today in No. 29382, which was to the effect that so long as the defendant should not be in default in respect to any of the monthly payments of $300.00 or any payment of the emergency fund, the interest accruing, from time to time, upon the bonds of the face value of $5,000.00, deposited with the Northern Trust Company should belong to and be paid to him. The petition further set up that he was not in default in either of the respects mentioned, and that there was interest to the amount of $100.00 which had accrued on the bonds, but that the trust company refused to pay him that sum,

and he prayed that an order be entered directing that the $100.00 be paid to him in accordance with the terms of the supplemental agreement and decree.

On March 26, 1924, complainant filed her answer to the petition wherein she set up matters tending to show that the defendant was in default in making the payments required of him, and, therefore, not entitled to the $100.00 interest, and on the 1st of April, 1924, the court entered an order in accordance with the prayer of the petition, from which complainant appealed. We think the court was in error in entering the order, for the reasons stated in the opinion filed today in the other case. The supplemental agreement made between the parties and which contained the provision for the deposit of the bonds with the trust company was a binding and valid obligation and if its provisions were violated in the respect complained of in the petition, the defendant could not have it specifically enforced in the divorce suit, but if he feels aggrieved he may apply for relief in a proper forum.

The Superior Court was without jurisdiction to enter the order and it is reversed.

REVERSED.

THOMSON AND TAYLOR, JJ. CONCUR.

1 - 28353

JOSEPH ZBETOVSKY,

Plaintiff in Error,

v.

ANTON DOUPNIK,

Defendant in Error.

237 I.A. 647

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed April 29, 1925

MR. JUSTICE TAYLOR delivered the opinion of the court.

It appears from the record in this case that the plaintiff, Zbetovsky, sued the defendant Doupnik in a justice court of Cook County and there recovered a judgment against him for $292 and costs on December 20, 1918. Immediate execution was issued by the justice of the peace, on plaintiff's affidavit as contemplated by paragraph 130, chapter 79 of the statute, (Cahill's Illinois Statutes, ch. 79, par. 130) which was returned the next day unsatisfied. It does not appear from the return, that a demand was made under this execution. Thereupon, a transcript of the judgment was filed in the Circuit Court of Cook County on December 23, 1918, for the purpose of reaching certain real estate owned by the defendant. On December 26, 1918, a writ of fieri facias was issued out of the office of the clerk of the Circuit Court, on which the sheriff made a return to the effect that on December 31, 1918, he levied on the defendant's title to certain real estate described in the return. These steps were taken in conformity with the provisions of paragraph 136 of chapter 79 of our statute,

(Cahill's Illinois Statutes, ch. 73, par. 136) The record further shows that on January 28, 1919, the sheriff sold the property of the defendant which had been levied upon, the time and place of the sale having been duly advertised as required by law, the buyer at this sale being the plaintiff and the property being sold for the amount of the judgment, and costs.

On January 8, 1919, the defendant filed his appeal bond in the office of the clerk of the Circuit Court of Cook County, and also his appearance, in connection with his appeal from the judgment entered against him in the justice court, and summons was duly issued against the original plaintiff, Zbetovsky. This summons was returned "Not found", on January 20, 1919. The defendant filed a transcript of the proceedings in the justice court in connection with his appeal on January 9, 1919. On January 8, 1919, a supersedeas was issued out of the office of the clerk of the Circuit Court, against the justice of peace and the constable, requiring them to desist from any further proceedings in the suit in the justice court. This was served on the Justice of the Peace the same day, but there is no return of service on the constable. On January 22, 1919, an alias summons was issued out of the office of the clerk of the Circuit Court, but again, service on the plaintiff was not had and this summons was returned "Not found," on February 17,1919.

The record contains a notice of motion filed April 2, 1919, from the defendant to the plaintiff, to the effect that the defendant would move the court to place the cause (Appeal) on the short cause calendar. There was an affidavit

of service by mailing a copy to the plaintiff. The record does not disclose what, if any, action the trial court took as to this motion.

The record shows that on April 28, 1919, on motion of counsel for the defendant, the cause was dismissed and judgment was entered by the court against the plaintiff for costs. The record does not show whether that action was taken in connection with a hearing on the short cause calendar or not. On the next day, April 29, 1919, a writ of fieri facias was issued out of the office of the clerk of the Circuit Court for the costs, on which judgment had been entered the previous day against the plaintiff. The return on this writ shows that demand had been made on the plaintiff and that the writ had been satisfied in full, and on the reverse side of the writ there also appears the receipt of the attorneys for the defendant, acknowledging full satisfaction of the writ,- $18.05.

So far as the record shows, nothing further was done in this case for nearly two years. On December 17, 1920, the defendant filed a notice, directed to the plaintiff, saying that he would present his petition to the Circuit Court and pray for certain relief, as set forth in a petition, copy of which "is herewith submitted to you." This notice contains an affidavit of service by mailing. This petition appears in the record as filed under date of January 8, 1921. On January 5, 1921, the plaintiff filed a notice directed to the defendant to the effect that on that day he would move the court to vacate the order of April 28, 1919, dismissing the cause, and the judgment then entered against him for costs, and ask that

the cause be reinstated. On the same day the plaintiff entered his special appearance, for the purpose of raising the question of the jurisdiction of the court in entering the orders of April 28, 1919. The plaintiff's motion, made pursuant to that notice, was entered on January 5, 1921, and continued to January 28, 1921.

On January 14, 1921, the defendant filed a notice addressed to the plaintiff, to the effect that he would move that the proceedings on the real estate transcript, instituted in the Circuit Court by the plaintiff, be consolidated with the defendant's appeal. Affidavit of service of this motion, by mailing a copy, was attached to the notice. Under date of February 19, 1921, the defendant filed a notice, addressed to the Sheriff of Cook County, that he would move the court to quash the execution, levy and sale which had been made by him, pursuant to the transcript filed by the plaintiff.

Again, on February 19, 1921, the motion of the plaintiff, to vacate the order of dismissal and judgment for costs, of April 28, 1919, was entered, and the record states that the court took it under advisement. Finally, under date of March 12, 1921, on motion of defendant's counsel, the court consolidated the transcript proceedings with the appeal, and further ordered that the execution theretofore issued on the real estate transcript and the levy had thereon and the sheriff's sale, "are each and all quashed and held for naught." On the same day the court denied the motion of the plaintiff to vacate the order of dismissal and judgment for costs, of April 28, 1919,

and to reinstate the cause. The plaintiff prayed an appeal from the latter order but that appeal was not perfected. Subsequently, on February 28, 1933, the plaintiff sued out this writ of error. This was after the expiration of three years after the entry of the judgment and orders complained of, which was the limit of the period within which a writ of error could be brought seeking to reverse such judgment and orders, as the law stood at the time such judgment and orders were entered. Cahill's Illinois Statutes, Ch. 110, par. 117. No point has been made of this, however.

It is the defendant's contention that the plaintiff is not now in a position to question the validity of the judgment against him for costs and the action of the trial court in dismissing his cause, inasmuch as he paid that judgment and satisfied in full the execution which was issued thereon. This is not the law. In paying the judgment and satisfying the execution, the plaintiff did not waive any error that might have intervened in the proceeding which resulted in that judgment. The payment may not be regarded as so far voluntary was to operate as a release of errors, if any existed. While the acceptance of the benefits of a judgment operates to release errors in the record, the payment of a judgment, either voluntary or involuntary, does not do so. Richeson v. Ryan, 14 Ill. 74; Natch v. Jacobson, 94 Ill. 584; Page v. The People, 99 Ill. 418; Beardsley v. Smith, 139 Ill. 290; Armstrong v. The Douglas Park Building Assn., 176 Ill. 298; Schaeffer v. Ardery, 338 Ill. 557; Lott v. Davis, 282 Ill.148; Borah Drainage District v. Ankenbrand, 277 Ill. 138; Thossing v. Hawkins, 281 Ill. 454; Cheney v. Baker, 302 Ill. 481;

Huppart v. Nichols & Son, 84 Ill. App. 683; Lancaster v. Bartscht, 152 Ill. App. 533.

In our opinion the trial court erred in dismissing the cause on April 28, 1919, and in entering judgment against the plaintiff for costs, for, so far as the record shows, the court had no jurisdiction over the plaintiff. Our statute provides, in chapter 79, paragraph 116, (Cahill's Illinois Statutes, ch. 79, par.116) in case of an appeal from a judgment of a justice of the peace to the Circuit Court, that the one so appealing may file an appeal bond in the office of the Clerk of the Circuit Court, whereupon, a supersedeas shall issue to the Constable and justice of the peace and also a summons, directing the appellee to appear at the term of the court to which the appeal is returnable, "which summons and supersedeas shall be served and returned, as summons in other cases." That procedure is necessary in order that the Circuit Court may acquire jurisdiction so far as the appellee is concerned. No such procedure was had in the case at bar, as is apparent from the foregoing references to the record. However, it should be said that when this case has been remanded to the Circuit Court, and reinstated there, the court will then have complete general jurisdiction of the plaintiff. This will be true, notwithstanding the special appearance which he filed. To grant or refuse the motion made by the plaintiff, requesting the trial court to set aside the order dismissing the cause and the judgment against him for costs, and to reinstate the case, required the exercise of jurisdiction by the court of the subject-matter of the cause and of the plaintiff, and by making such motions, the plain-

tiff must be considered as having waived his special appearance theretofore entered for the purpose of objecting to the jurisdiction of the court. The People v. Smythe, 232 Ill. 242. The plaintiff could certainly not be heard to ask the court to reinstate the cause and at the same time urge that the court was still without jurisdiction.

We are further of the opinion that the trial court erred in consolidating the real estate transcript proceedings and the appeal, and also in quashing all proceedings under the real estate transcript. The latter may not be attacked collaterally on motion. Such ground as the defendant may have for thus attacking those proceedings, should be set up by a bill in equity. Zbetovsky v. Obzera, 324 Ill. 638.

For the reasons stated the judgment of the Circuit Court is reversed and the cause is remanded to that court for trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

29247

158 - 29247

CHARLES E. BELLENBARGER, by Fred R. Hummel, as Trustee in Bankruptcy,

Appellee,

v.

ROBERT S. MAHIN, ET AL. On Appeal of SARA SHATZ,

Appellant.

287 I.A. 647

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed April 29, 1925

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a bill for an accounting whereby the complainant, Bellenbarger, sought to have settled certain accounts which grew out of a long series of transactions involving money borrowed and money paid, and asked for an injunction against the collection of a certain judgment. Only one defendant, Sara Shatz answered the bill. There was a reference to a Master, & report finding in favor of the complainant, and a decree in accordance therewith. This appeal is therefrom.

Bellenbarger, in business as a manufacturer of machinery, and whose place of business was located at 1949 Fulton Street, Chicago, sought in the summer of 1921, to borrow some money. Through one Flint, he met at his office in the Unity Building the defendant, Robert S. Mahin, an attorney at law; and on July 23, 1921, talked to him about getting a $7500.00 loan on a second mortgage on his, the complainant's, property. The loan was made, and Mahin gave Bellenbarger his check for $7500.00, and Bellenbarger gave

back his check for $1,275.00 to Nahin. This latter check purported to be for Nahin's services. Nahin testified that in the course of the negotiations he told Dellenbarger that he, the witness, could get it from Sara Shatz, a violinist, but that it would cost him, Dellenbarger, $1,250.00, which would include several hundred dollars to Sara Shatz's father who had first mentioned his daughter as being able to make the loan, an attorney's fee, and, apparently, one thousand dollars for getting the loan.

Dellenbarger's evidence is that he borrowed the money through Nahin from the latter's client; that Nahin did not render him any services. He denied that he ever offered Nahin anything for his services. The $7500.00 loan was evidenced by 12 promissory notes, 3 for $300.00 each, 3 for $400.00 each, 5 for $500.00 each, and one for $2900.00, all dated July 23, 1921. They were all payable to the order of the makers, were duly endorsed by them, secured by a trust deed to Sarah Shatz, and were all payable at the office of Nahin. The interest provided was at 8%.

As to the $7500.00 transaction, the Master found as follows:

"That at the time of the execution of said notes and trust deed * * * Dellenbarger received the sum of $7,500 from said Nahin; that thereupon, at the request of Nahin he gave Nahin a check for $1,275, dated July 25, 1921, payable to the order of said Nahin. Nahin told Dellenbarger that said sum was payment for services rendered by said Nahin, who was at that time an attorney at law engaged in the practice of

his profession. It is claimed by said Rahin that said money was paid to him by Bellenbarger for certain services other than in connection with said loan, but the master finds that at said time no services of any kind had been rendered to Bellenbarger by Rahin and the master therefore concludes that said payment of $1,275 was made to Rahin by Bellenbarger in connection with said loan of said sum of $7,500; of said sum of $1,275 the sum of $200 was paid by Rahin to said Abraham Shatz and the sum of $75 was paid to one Bunting."

In the next month, August, the complainant obtained an additional sum from the same source. The master's finding on that transaction is as follows: "The complainant procured a further loan of $3,000, through said Rahin, of which $500 was subsequently paid, leaving a balance of $2,500; Bellenbarger again increased said loan, having received an additional sum of $1,500 from said Rahin, making a total of $4,000, and on the 9th day of March, 1922, the complainant, together with Alta S. Bellenbarger, his wife, and C. C. Bellenbarger, his son, executed a judgment note for the sum of $4,000, payable to the order of Sarah Shatz, due sixty days after its date, at the office of said Robert S. Rahin, with interest at the rate of 6 per cent per annum; that said note also provided for the sum of $400 attorney's fees in case judgment was entered thereon; that as collateral security for said last mentioned loan, Bellenbarger deposited with said note 53 shares of the capital stock of the Mother Goose Products Company, of the par value of $100 each and 89 shares of the capital stock of the Sunnyside Orchard Park

Company, also of the par value of $100 per share."

"At the time of the making of the said loan of $3,000 Dellenbarger paid Nahin at Nahin's request the sum of $420 for services in connection with said loan and on March 2, 1932, at the time of the making of said note for $4,000 Dellenbarger gave Nahin three checks for the sum of $35, $325 and $225, respectively, aggregating $585, all of which checks were cashed and were given in connection with said last mentioned loan."

As to charges which were made by Nahin for alleged services, the Master finds as follows: "That said sum of $1,275 paid Nahin in connection with said loan of $7,500 hereinbefore mentioned was 17 per cent of the total amount of said loan; that the entire loan was due within one year, making a total charge of 17 per cent plus 6 per cent mentioned in said notes, or 23 per cent a year; that $420 paid in connection with said $3,000 loan was 14 per cent of the principal, besides the 6 per cent mentioned in said note; that the sum of $585 paid in connection with said last mentioned loan is an excess of 33 1/3 per cent of the amount of the money actually advanced which was $1,600, or at the rate of about 200 per cent a year."

It is claimed by Nahin that said payments to Nahin for alleged services were made to him for services in connection with matters other than the loans in question. The master found from a preponderance of the evidence, however, that no other services were performed by Nahin for Dellenbarger; that Nahin was the agent of Abraham Shatz and Sarah Shatz at the time said loans were made and that the charges

made by Rahin in connection with said loans and the payments made by Sellenbarger, therefore, constitute usury and the master therefore concludes that the lenders of said money forfeited all rights to recover interest on said moneys loaned.

After the loans were made, Sellenbarger paid from time to time, certain amounts, the last being dated May 29, 1922, to Rahin. The master figures the total as $7,324.85.

On July 13, 1922, judgment in the sum of $3,875.00, was taken in the Municipal Court by said Shatz against the complainant and his wife and daughter, on the $4,000.00 note.

The evidence shows that in the course of the proceedings, on November 15, 1922, a motion was made by the attorney for Sara Shatz to dissolve the injunction that had been granted against the collection of the judgment in the Municipal Court. After some discussion before the Chancellor, he informed counsel that he would dissolve the injunction unless the complainant paid the balance due, which the master, eliminating all interest, and recognizing all the payments made by the complainant, had found to be $4,185.55. The witness Shaffner testified that accordingly he handed Fine, attorney for Sara Shatz, a certified check for $4,175.85, and that it was agreed between them that the judgment should be satisfied and the collaterals surrendered, and that the Chancellor was so informed. Fine testified that he moved to dissolve the injunction; that he suggested to the court that the complainant pay the amount admitted in the bill to be due; that several weeks later the payment was made; that

he, the witness, said to Shaffner, "I will give you liberty of applying that payment in any manner you desire, either entirely on the $7,500 loan, or will satisfy the judgment in the Municipal Court and return you the collateral"; that that judgment was for $3,825 and costs; that the complainant said he would rather satisfy that judgment and have the collateral returned; that he, the witness, did so and the excess was applied on the total debt of $9,872.24; that after making the credit of $4,175.00 there was left due $5,697.24.

As to those facts, and the agreement, if any, on that subject, the Master found as follows: "That subsequent to the filing of the bill of complaint herein and on the 15th day of November, 1922, said Dellenberger, through his attorney, paid to the solicitor for the said Sarah Shatz, the sum of $4,185.85. It is claimed on behalf of the complainant that said sum paid was the balance due said Sarah Shatz on account of all the moneys loaned and advanced to said Dellenberger and that all of the collaterals deposited with said loans were surrendered and returned to the said Dellenberger. On behalf of the defendants, it is claimed that said sum was paid in satisfaction of the judgment entered in the Municipal Court of Chicago on the said 13th day of July, 1922, as hereinbefore set forth.

The master finds from a preponderance of the evidence that said sum was paid to said defendant Shatz as the balance due on all loans made; the total payments theretofore made by said Dellenberger, as hereinbefore set forth, amounted to $7,324.85, and said sum, together with the sum of forty-one hundred eighty-five and 85/100 dollars ($4,185.85) paid as

aforesaid, made a total of $11,500.70, which was the total of the moneys loaned to said Bellenberger."

The evidence showed that many of the checks given by the complainant to Nahin had memoranda on them to the effect that they were given for services, and it was claimed for the defendant that Nahin was the agent of the complainant. On those subjects the Master found as follows: "The master finds that while some of the checks given to the said Nahin by said Bellenberger contained endorsements to the effect that the same were given for services rendered, the master finds that all of said payments were made on account of said loans; no legal services were ever rendered by said Nahin to said Bellenberger."

"It is contended on behalf of the defendant, Sarah Shatz, that several of said payments made to Nahin by Bellenberger were not transmitted to her by said Nahin and that they were improperly made to Nahin. The master finds that all of said loans were made payable at the office of said Nahin; that all of Bellenberger's dealings with reference to said loans were with Nahin; Bellenberger never met or saw Sarah Shatz; Nahin was her duly authorized agent throughout the transaction here in question and the master concludes that the said Sarah Shatz is, therefore, bound by all of Nahin's acts in said transactions."

"The master therefore concludes that there is nothing due from said complainant herein to said defendant, Sarah Shatz, nor to any of the defendants herein on account of said loans hereinbefore mentioned."

The pleadings and the evidence show that the chief question to be answered is whether Mahin acted as the agent of the complainant or of the defendant Sarah Shatz. If Mahin was the agent of the latter, then all that he exacted or received from the complainant in excess of, and in addition to interest allowed by law, was usurious, and in stating the account, the complainant would be entitled to credit to that extent. Normally, as business is generally conducted it is not difficult to discover whether one is the agent of the borrower or the lender. But, here, in view of the testimony and written evidence, there is a controversy, and it becomes necessary to scrutinize the record with care. In Clemens v. Crane, 234 Ill. 215 the court said, "The form of the contract is not conclusive of the question. The desire of lenders to exact more than the law permits and the willingness of borrowers to concede whatever may be demanded to obtain temporary relief from financial embarrassment have resulted in a variety of shifts and cunning devices designed to evade the law. The character of a transaction is not to be judged by the mere verbal raiment in which the parties have clothed it, but by its true character as disclosed by the whole evidence. If, when so judged, it appears to be a loan or forbearance of money for a greater rate of interest than that allowed by law, the statute is violated and its penalties incurred, no matter what device the parties may have employed to conceal the real character of their dealings. In Cooper v. Hack, 27 Ill. 301, on page 303, this court said: 'In such transaction it is the intention of the parties, not the forms employed, which fixes its character. If it were

otherwise, every species of fraud, oppression and wrong might be perpetrated with perfect impunity. Hence in trials of questions of usury it has ever been held that no device intended to cover up the real character of the transaction can ever avail to defeat the statute.' It is the constant practice of courts to resort to extrinsic evidence to determine the question of usury." (Citing, 2 Jones on Evidence, Sec. 441; 1 Elliott on Evidence, Sec. 381; Ferguson v. Smithen, 3 Gilm.547; Reeve v. Strawn, 14 Ill.94.

There is no doubt but that the money came from Sara Shatz; that it went to Nahin, and that he loaned it for her; that the notes which represented her loan were payable by the complainant at Nahin's office; that when payments were made by the complainant they went to Nahin and that he was responsible to Sara Shatz for what he got. It would be straining the evidence beyond reason to hold, as the defendant contends and as Nahin tried to prove, that the latter was the complainant's agent. Nahin, therefore, being the agent for the lender Sara Shatz, she is responsible for what he got, no matter how much of what he received he appropriated for alleged 'services' for the complainant. When then the $4,175.85 was paid as the result of the agreement, whether that agreement was as claimed by Fine or Schaffner, it resulted in a payment in full of all the principal that the complainant had received from Sara Shatz. It was practically admitted by Sara Shatz' attorney that the complainant paid back all that he had received. Also, no question was raised at the trial as to whether or not the final payment included interest at the legal rate, and so it cannot be raised here. There is no assignment of error

based on any finding of the Chancellor in regard to legal interest. Strayer v. Hickerson, 213 Ill. 414; Ortmeir v. Ivory, 208 Ill. 577. The defendant, Sara Shatz, might have objected when the $4,175.85 was paid and claimed that the legal interest remained unpaid, but no such objection was made. The Chancellor would not have allowed the motion to dissolve, if it had been shown that something, such as legal interest, was still due.

After carefully considering all the evidence shown, we are of the opinion that we are not justified in setting aside or modifying the decree. It may seem to be a hardship that the defendant should be chargeable with having received back all the principal, and not here be able to get even legal interest; but, she trusted Nahin, and, if injured by him, has her remedy for his conduct.

The decree, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

184 - 29273

LEWIS-SIMAS-JONES COMPANY, Appellee,	APPEAL FROM
v.	CIRCUIT COURT, COOK COUNTY.
PETER PEERBOLTE, Appellant.	

Opinion filed April 29, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Lewis-Simas-Jones Company, brought suit in the Circuit Court against the defendant, Peter Peerbolte, on three promissory notes. The court instructed the jury that the evidence offered was insufficient in law to support the defense set out in the pleas, and directed them to return a verdict finding the issues for the plaintiff and to assess its damages at $7,810.88. That was done, and a judgment entered in the plaintiff's favor for that amount. This appeal is therefrom.

It is claimed for the defendant that the notes were obtained by fraud; that they were without consideration, and that the plaintiff was not a holder in due course. All three notes were dated March 3, 1922. The first was for $2500.00, and payable March 15, 1922. The second was for $2500.00, and payable April 1, 1922. The third was for $2500.00, and payable April 15, 1922. All three recited that they were for value received; all were signed by the

Opinion filed April 22, 1976.

defendant, Peter Peerbolte, and two were endorsed, R. C. McGill & Co., and F. C. Jones and one, R. C. McGill & Co.

The plaintiff made out a prima facie case by offering the notes in evidence, and rested. The defendant then put in evidence in defense. There was offered in evidence for the defendant two written contracts for the sale of certain quantities of onions. The first was dated April 14, 1921, and recited that Rau and Co. had sold to Peacock and Co. 10,000 bushels of onions at $1.00 a bushel, shipment to be made 1st half of February, 1922. On that contract there was endorsed an assignment dated January 18, 1922, by R. C. McGill & Co., to Peter Peerbolte. The second, was dated April 18, 1921, and recited that the Cooperative Onion Set Growers Assn. had sold to Peacock and Co. 11,000 bushels at $1.10 a bushel, and 3,000 bushels at $1.25 a bushel, shipment to be made between January 1 and 20, 1922. That sale contract, also, bore an assignment, dated January 18, 1922, from R. C. McGill & Co. to Peter Peerbolte. The signature of the Cooperative Onion Set Growers Assn. was signed by Peter Peerbolte, Manager.

Those two contracts Peacock testified he had in his possession until the early part of January, 1922; that at that time, his company being in debt to R. C. McGill & Company, McGill called on him to see about arranging for its payment; that he told McGill that Peacock and Co. had the Rau and Cooperative Assn. contracts, and that, as they covered a large quantity of onions bought on a basis of $1.00 a bushel, and the market at the time was about $1.50

or $1.60 a bushel, if he, McGill, would take the contracts in partial payment, he could arrange it so that R. C. McGill & Co. would make the difference as a credit on their account, and by doing so, liquidate Peacock & Co.'s debt in the course of two or three months; that, later, at another meeting, McGill called and expressed a willingness to carry out the proposition and to have it put in proper form; that then McGill asked him to loan him, McGill, the two contracts for the purpose of having his attorney look them over and draw up appropriate papers; that he complied with McGill's request, gave him the two contracts in December, 1931; that he got nothing from McGill, and turned the contracts over to him for no other purpose than to submit them to his, McGill's attorney; that he never saw McGill afterwards, and was never able to get back the sale contracts.

The evidence of the defendant, Peerbolte, is that he lived in South Holland, Illinois all his life; that he was in the onion business; that he knew McGill for five or six years, that about a week prior to January 18, 1932, McGill told him he had the Mou and Co-operative Onion Set Growers Assn. contracts, and some warehouse receipts for onion sets; that he owned them and wanted to sell them; that he got them from Peacock; that he, Peerbolte, asked why they contained no assignment; that McGill said it was unnecessary; that he, Peerbolte, called up a lawyer and was advised that no assignment was necessary; that on January 18, 1932, he, Peerbolte, got the contracts and gave McGill therefor certain notes; that those notes were destroyed; that later, about February 1,

1922, the notes here in question were signed and delivered; that at that time he got nothing from McGill. The defendant further testified that he never received the onion sets under the Rau contract, but got a pro rata delivery under the Co-operative Onion Set Growers Assn. contract.

Peacock, part of whose testimony is recited above, further testified that he again saw the sale-contracts in Peerbolte's office in the latter part of February, 1922; also, that he received deliveries on both of them. On cross-examination, he testified that Peerbolte delivered the two sale-contracts to him in the latter part of February; that they were left in Peerbolte's attorney's office and on the strength of that he took the deliveries from Rau and the Co-operative Onion Set Growers Assn. He further testified that his concern, Peacock & Co., went into bankruptcy in March 1922, and that he did not list the onion sets in question as an asset, nor McGill & Co. as a creditor.

One DeYoung testified that the original notes that were destroyed contained the provision that they were payable only if the onions which were bought (meaning those in the two sale contracts) were delivered.

One Glessner, for the plaintiff, testified that the notes in question were signed about March 3, 1922, and that McGill was not in Illinois between February 11 and March 1, 1922.

The two letters from McGill & Co. to Peerbolte were introduced in evidence. The first, dated March 22, 1922, contained the following: "We deposited your note for $2300.00,

upon my return, but we were advised by our bank that same has been returned 'unpaid.' I, therefore, wired Glessner to advise us what was the matter, and he answered me immediately and stated that you had advised him that you had requested the bank to hold the note for a few days and that it had been returned by mistake. We are very sorry that this happened, and are sending the note through again for collection and trust that you can take it up next time."

The second, dated March 31, 1928, contained the following: "Mr. Glessner has also advised us relative to the position that you take regarding the promissory notes that you gave our Mr. McGill covering the sale of Onion Set contracts. We believe that you are entirely unwarranted in refusing payment on these notes as they fall due."

But two points are made for the defendant. First, that the giving of a new note in renewal of an old does not waive fraud or want of consideration, and the consideration of the new note is the consideration for the old one; and, second, when a note is procured by fraud, or when the consideration has failed, the burden is then on the holder to prove that he or the party under whom he claims acquired the title as holder in due course.

As to the effect of making the so-called renewal notes, in Wheelock v. Barkeley, 138 Ill. 153, the court said, "whether a subsequent note is given in payment of or only in renewal of a prior note is not a question of law, but one of fact, to be determined by the jury; and when it is given in

renewal only of a prior note, the real consideration for which it is given is that for which the prior note was given, and it is, in a suit upon the subsequent note, competent to show that that consideration has failed." Here, there is convincing evidence that the consideration of the original notes which were destroyed was the two sale-contracts, and there is, as a corollary, persuasive evidence that the notes sued upon were given in place of the old notes, and for the same consideration. Indeed, it was a question of fact for the jury, as to just what was done, although, it seems quite obvious from all the evidence on the subject that it was actually proven that the real transaction, as a matter of fact, was that the old notes, though made and destroyed, were part of what might be called a continuing negotiation leading up to the final arrangement whereby McGill & Co. got the new notes and the defendant the sale-contracts. At least, it was a question of fact for the jury, unless other matters made the question of consideration immaterial.

As to the charge that the notes were procured by fraud and whether the plaintiff was a holder in due course, when it is shown that the title of one who has negotiated a note is defective, it becomes the responsibility of the holder to prove that he or some one through whom he claims, got title as a holder in due course. Chap. 98, Par.79, Cahill's Rev. Stat. 1923. There is direct evidence, not directly controverted, as McGill was not called, that the only consideration for the notes was a delivery by McGill & Co. of salescontracts it did not own or have the right to

pledge, and not evidence whatever was introduced even tending to show how the plaintiff acquired the notes. The evidence is dubious, as a matter of fact, as to when the plaintiff got the notes. The letter of McGill & Co. to the defendant, dated March 22, 1932, is quite convincing evidence, that on that date, McGill & Co. owned the $2200.00 note which wasopayable on March 15, and so was a week overdue; and that the plaintiff got it after maturity. Also, the same letter, is some evidence that McGill & Co. may have owned all three of the notes at that time, as the letter suggests that the defendant had made some objection to all the "promissory notes that you (defendant) gave our Mr. McGill covering the sale of onion set contracts." The second note was due April 1, and the letter referred to was dated March 1, 1932. So, it was a question of fact for the jury as to which, if any, of the notes was acquired by the plaintiff before maturity. In Bradwell v. Pryor, 221 Ill. 602, the court said: "The rule now is, that the indorsee or assignee of commercial paper who takes the same before maturity for a valuable consideration, without knowledge of any defects and in good faith will be protected against the defenses of the maker." But, that is when taken before maturity. Counsel for the plaintiff argue, quite elaborately, the evidence as to alleged fraud, but that is all a matter of fact, which should have been submitted to the jury. The evidence on the subject is considerable, quite involved and somewhat contradictory, and being material it was not for the trial judge to instruct the jury that it was insufficient in law to support the defense.

The defendant pleaded the general issue; that the plaintiff was not a holder or owner in due course; and that the notes were obtained by fraud and without consideration. That entitled him to have the evidence submitted to the jury.

The judgment, therefore, will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

Term No. 211
Gen. No. 29300

237 I.A. 647

THEODORE AARON, INC.,
a Corporation,
Appellee,

vs.

MAURICE COHEN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Apr 29, 1925

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 28, 1922, the plaintiff, Theodore Aaron, inc., brought suit in the Municipal Court, claiming that the defendant, Maurice Cohen, had bought a car of butter and then refused to take or pay for it, and that it, the plaintiff, had been compelled to sell it at a loss. There was a trial, with a jury, and a verdict, and judgment, after a remittitur, for the plaintiff in the sum of $1,355.18. This appeal is therefrom.

The plaintiff's statement of claim alleged in substance the following: that on December 3, 1921, the plaintiff and the defendant entered into a contract by which the plaintiff agreed to sell and the defendant agreed to purchase 288 tubs of butter, then in storage in the United States Cold Storage Warehouse in the City of Chicago, consisting of certain lots, of a total weight of 18,068 pounds, at 35½ cents a pound, or a total of $6,414.58, delivery to be tendered on December 5, 1921, and payment by the defendant to be made within 24 hours thereafter, the defendant to pay also certain incidental charges of $14.14. It further alleged that the plaintiff on December 5, 1921,

did duly deliver to the defendant certain warehouse receipts and delivery orders for the butter; that the defendant "expressed his assent to becoming the owner" of said butter; that on December 7, 1921, the defendant refused to take possession of the butter and returned the warehouse receipts and delivery orders and notified the plaintiff that it would have nothing further to do with the butter; that afterwards, in the exercise of due diligence, the plaintiff sold the butter for $4,984.36; that the plaintiff expended $204.70, and realized $4,779.30 net from the resale. The plaintiff asked judgment for the difference, being $1,549.14.

The defendant in his affidavit of merits denied making the contract, and specifically denied all the material allegations of the statement of claim. He set up that there was no memorandum of the alleged transaction made or signed by the defendant and that the alleged contract was void under the Statute of Frauds. Issue was joined as to the existence of any contract of sale, and as to damages. It is contended here that the evidence does not prove a contract of sale was made, and that the verdict is against the manifest weight of the evidence. The defense of the Statute of Frauds was waived at the trial.

Theodore Aaron, who had been in the produce business for twenty-three years, and who was at the head of the plaintiff corporation, testified that prior to December 7, 1921, Cohen, the defendant, called him up and said he wanted a car of butter for the Great Lakes; that he advised the defendant to keep out of the butter business; that he, the

defendant, said he could get the Great Lake's business if he could get the butter at the right price; that he, the witness, gave him a price at that time and the defendant said he would call him up later; that later the defendant called him up and said, "I want that car of butter; I told you that you would have to get me a car of butter. I have got your price, I have got to have it;" that he, the witness, said, "I will try and get you a car of butter;" that he, the witness, then bought the butter from Schroeder & Co.; that later, on Friday, December 2, 1921, he telephoned the defendant that he had it, and to come down, or send some one to inspect it, with one of the plaintiff's men, having in mind one Gregory; that, on the same day, Muntsberger (then a food inspector in the U. S. Navy Department with headquarters at the Great Lakes) and Gregory went to the defendant's office and came back to plaintiff's store; that he, the witness then called up the defendant and said, "How do you like that butter?" "I didn't want to buy this butter unless I have got it sold; I didn't like the market;" that the defendant said, "We have got to have the butter, a car of butter;" that he, the witness, then said, "You understand you have got to pay cash for this;" that the defendant said, "Send down for your money that will let you pay for the car of butter and I will take delivery on it;" that the price he made to the defendant was 35½ cents a pound; that he told the defendant there was approximately 18,000 pounds, 288 tubs in the car; that he sold the defendant a specific lot of butter in the United States Cold Storage Warehouse; that an invoice to the defen-

dant was made out immediately by his bookkeeper, and that, and a delivery order from Schroeder & Co. to the plaintiff dated December 3, 1921, and a delivery order by the plaintiff to the defendant dated the same date, were sent by him, the witness, by Gregory to the defendant; that he next saw them when they came back by mail from the defendant; that the defendant called up and wanted to see the warehouse receipts, and he sent them over on Monday; (which was December 5) that he went over to the defendant's place of business on Monday and asked him for a check for the butter; that the defendant said, "Let it go until tomorrow;" that he, the witness, said, "All right;" that he sent around for it on the following day and the defendant said, "I absolutely refuse to pay for that butter until I take delivery for it;" that he, the witness, said, "When will that be?" and the defendant said "Wednesday," and walked away; that on Wednesday he went over with Gregory to see the defendant and to collect for the butter; that the defendant said he was not going to take the butter because his people were not going to take it; that after some further talk, the defendant threw the papers down on the floor; that he, the witness next saw the papers when he received them in an envelope; that it contained the delivery receipts, warehouse receipts and invoices. Gregory, who was at the time in question a salesman for the plaintiff, gave evidence by deposition as follows: that on Saturday (December 3) the defendant had been given the invoice for the car; that on Thursday (December 1) the defendant called Aaron up and asked him to get a car of butter for him, the defendant, as he

had a prospective purchaser; that he heard the conversation on an extension telephone; that Aaron agreed to get the defendant a car; that he told the defendant he (Aaron) had some the defendant could buy, and mentioned the price; that the defendant said he would have his prospective buyer go and look at the car of butter; that he did so; that he, the witness, on Friday, December 2, took Huntsberger, the prospective buyer, inspector for the Great Lakes Naval Training Station, in a taxicab to the cold storage place and ordered down a sample of ten tubs of butter; that Huntsberger inspected every tub of the sample; that there were approximately 300 tubs in the car; that Huntsberger said it was a very good car of butter and that he would talk with the defendant; that on Saturday the invoice of the car was presented to the defendant's bookkeeper and he, the witness, was told to call Monday for the check; that on the same day the defendant asked by telephone for a warehouse receipt for the car, and he delivered it on Monday morning; that on Monday, he, the witness, went with Aaron to the defendant's store; that they first saw one Kurth; (manager for the defendant) that Kurth acknowledged that the defendant had bought the car of butter; that afterwards, on the same day, he and Aaron saw the defendant; that the latter told him to call Wednesday for the check; that on Wednesday he, the witness, and Aaron went again to the defendant and the latter said he would not accept the car of butter; that Huntsberger was in the store at the time; that it was after calling Huntsberger upstairs and conferring with him that he said he would not take the car; the defendant tendered the receipt to Aaron and to him the witness, who refused

it, and then threw it on the floor, saying it was not a car of 92 score butter, and then went away; that at that conference, he, the witness, saw the warehouse receipt in the defendant's possession; that on Thursday there was some further talk; that the defendant said it was not suitable for his purchaser; that he said if Aaron would go ahead and sell the car, he would protect the plaintiff against loss; that he, the witness, drew up a written agreement that in the event the plaintiff sold the car it would be for the defendant's account, but the defendant would not sign it; that immediately after the sale to the defendant on Friday, December 8, the butter market "broke badly."

The defendant testified that the agreement was that he was not bound unless he got an actual order, that that was the understanding between him and Aaron; that he did not get the order from the Great Lakes until about two weeks later and so was not bound; that he never received any warehouse receipts or any contracts; that Gregory showed him some warehouse receipts and he refused to take them; that when Aaron came to see him, he, the defendant, told him that he had not bought a car of butter, and would not take the papers until he, the witness, got an order for a car and had given the plaintiff an order. He further testified that he

got a contract from the Great Lakes for a car of butter about the first of the month and that he called Aaron and told him; that at Aaron's suggestion he had it inspected by Huntsberger; that the latter made the inspection and reported it satisfactory; that Gregory

then called him up, and he, the witness, told him of his agreement with Aaron; that Gregory said he would bill the car to him and he, the witness said, "No, I won't accept any bill for it;" that he then told Gregory that he, the witness, had not put in an order for the car, as he did not really have an order for it at that time. On cross-examination, he stated that he bid on a car for the Great Lakes but did not get the order until December 13.

Kurth, manager for the defendant, testified that the defendant told Aaron and Gregory that he had not bought the butter; that Gregory did not deliver any warehouse receipts; that the Great Lakes did order a car of butter in December but, as far as he knew, it was after Aaron's transaction; that the defendant then bought a car. On cross-examination, he testified that when one Elwood, for the plaintiff, called and handed him a bill and wanted a check, he, the witness, went upstairs and handed it to the defendant, and told him "Elwood is waiting for a check for Aaron," and the defendant said, "I will take care of that, it is not due until Thursday." On re-cross, he said he did not actually think it was for a car of butter for the Great Lakes.

One Becker, manager for the defendant, corroborated, in part, the defendant, that he would only buy if he got an order; that the only conversation he heard was in the latter part of November.

In rebuttal, Aaron testified that at a meeting on April 27, Kurth said that he went to the defendant and

told him that Aaron's man was waiting for a check for the butter, and that the defendant answered, "Tell him I will take care of him, it is not due until Wednesday or Thursday." Buntsberger, recalled, testified that it was the custom for the Great Lakes Naval Training Station never to send out an inspector until the article is ordered; that he inspected the car in question on the second, and that it was ordered before; that a copy of the order was sent to the defendant, a copy given to him, the witness, and a copy filed in the Commissary's Office; that they can rescind the order but do not; that he made no inspection until the order was given. The defendant, on rebuttal, testified that he did not have an order on December 1, that he got it on the 9th.

In view of the foregoing, it seems quite obvious that if the witnesses for the plaintiff told the truth, not only was a contract proved, but the verdict was not against the manifest weight of the evidence. Counsel urge that no sale price was proven. But, when Aaron was asked, "How much per pound did you make it to Cohen for?" he answered, "35½ cents per pound." Then, too, Gregory testified that "The car was sold to Cohen for 35½ cents per pound." With nothing to contradict it, that is sufficient.

Counsel urge that the quantity sold was not proven. But, when Aaron was asked, "Did you tell him how many pounds of butter that there was in the car?" he answered, "Approximately about 18,000 pounds a carload; that would be 288 tubs; I sold him a specific lot of butter in the United States Cold Storage." Then, too, the evidence for

the plaintiff, which the jury evidently believed, proved by means of the delivery orders all that was necessary both as to price and quantity.

It would be hypercriticism, indeed, to hold that the evidence for the plaintiff did not prove to the full all the necessary elements of an express contract. According to that evidence the plaintiff sold and the defendant bought a specified car of butter, of a specified quantity and at a specified price. That is sufficient. Some argument is made that it had been the custom of the plaintiff in making sales to the defendant to send an acceptance slip to be signed. That may be, but that did not make such a slip a necessity. No general custom or usage was shown.

It is urged that the plaintiff failed to show what the market price was at the date of the alleged breach, and that as a result, could only recover nominal damages. The plaintiff's suit is for damages for breach of the contract; for the failure of the defendant to take and pay for the goods, and it was its duty, in making a resale, to do so "in good faith, and in the mode best calculated to produce their value." Saladin v. Mitchell, 45 Ill. 79. Was the sale here made of that character? Aaron testified that he tried to sell the butter the very minute the plaintiff knew the defendant would not take it; that the butter market at that time was very weak; that it continued to go down so fast that they could not catch up with it; that he made a serious effort to sell the butter right away; that he tried to sell it to everybody that dealt in it; that there was a market if the price was right;

that he finally sold it for the market price, getting 27 to 28 cents a pound. Gregory stated that immediately after the sale to the defendant the market broke badly. There is no evidence denying that testimony. The plaintiff sold the butter in the first half of March, 90 tubs at $1498.88, 38 tubs at $633.84, and 158 tubs at $2793.56, being $4926.28 gross. Aaron in testifying to those amounts was allowed by the court to use certain sale sheets which he testified were part of the plaintiff's original records, kept in the regular course of business. Apparently, they were three sheets taken from the original record or book. To them and their introduction in evidence, objection was made. But, that was not well taken. Under the law an original account book, and so any part of it, kept in the regular course of business is always, if material, competent.

In our judgment the plaintiff sufficiently proved that he made the sales in good faith and within a reasonable time - there being no stable market at the time of the breach - and was entitled, as damages, to the difference between the original contract price and what he sold them for. Rice v. Penn. Plate Glass Co. 86 Ill. App. 407; Aladin v. Mitchell, (supra); Goebblings Sons Co. v. Lock Stitch Fence Co. 130 Ill. 660; 55 Cyc. 534; Section 60, Par.1 Uniform Sales Act.

It is urged that it was error to refuse admission in evidence of a certain written order of the Great Lakes Naval Training Station, offered for the defendant. That order was dated December 9, 1921. Considering all the evidence, we do not consider it of sufficient importance to justify a reversal. Complaint is made concerning

certain testimony of Gregory, and as to certain instructions, but, upon examination, we do not find them sufficient to justify a reversal. Further, all the instructions that were given are not set forth.

Objection is made to the form of the judgment. That order contains the following: "The court entered judgment upon the verdict in favor of the plaintiff, and against the defendant, Maurice Cohen, in the sum of $1355.18." It does not say "have and recover." The time has gone by when a matter of mere form is considered of the essence of a judgment order.

The words of the judgment order mean, to the full, that the plaintiff have and recover the amount. Sells v. Horan, 1 Ill. 337; Kean v. Leipold, 211 Ill. App. 183.

Having carefully considered the case and finding no substantial errors in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, P. J. AND THOMSON, J. CONCUR.

220 - 23309

LEO REZMAN,

Appellee,

v.

MAX TAUBER BONS ARSOPURE ICE CREAM COMPANY, a corp.,

Appellant.

237 I.A. 617

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment obtained in the Municipal Court, in a fourth class case, by the plaintiff, Leo Rezman, against the defendant in the sum of $224.32 for damages growing out of a collision between an automobile of the plaintiff and a motor-truck of the defendant. The case was tried before the court without a jury.

The statement of claim set forth that the plaintiff's automobile was being driven in a careful manner north on Michigan Boulevard near Ontario street; that a certain automobile truck owned, operated, managed and controlled by divers of the defendant's servants on June 4, 1922, was run, managed operated and controlled in a careless, negligent, willful and wanton manner in an easterly direction on Ontario Street at a high and dangerous rate of speed, whereby and as a direct result of the carelessness and negligence of the defendant, it ran upon and against the automobile of the plaintiff, damaging and injuring it in the sum of $300.00. An affidavit of merits was filed

by the defendant, which recited that the motor truck was not being driven carelessly; that it was not run in a careless manner so as to injure the plaintiff's automobile.

The first contention made for the defendant is that the statement of claim does not state a cause of action. That is untenable. The cause was tried solely on the question of the defendant's negligence. It is true that the statement describes the motor truck as "owned, operated, managed and controlled by divers of the defendant's servants," but no question was raised at the trial as to the ownership by the defendant. That was assumed, and, also, that the motor truck was operated by defendant's servants. Then, as to the duty to exercise care, no question was raised on that subject. Both parties put in evidence on the theory that each was bound to exercise care in the operation of the machines. The statement of claim quite sufficiently informed the defendant of the nature of the claim made against it, and there could but be, nor was there any misunderstanding. It was a claim of the fourth class, and what this court said in McGlynn v. Gillespie, 227 Ill. App. 400, applies. Thom v. Jackson, 221 Ill. App. 358; Shar v. Robinson, 298 Ill. 181.

The second contention is that the plaintiff failed to prove allegations of his statement of claim. On Sunday, June 4, 1923, about 11 a.m., the plaintiff, Leo Hessman, was driving a five passenger Buick automobile north on Michigan avenue, a north and south street, and when approaching Ontario street, an east and west street, saw a motor truck, used in the defendant's ice cream business, coming from the west and going east through the intersection of Ontario street and

Michigan avenue. The plaintiff testified that he was going from 18 to 20 miles an hour, and that he could stop within 15 to 20 feet. There were three automobiles abreast and the plaintiff's was in the middle, all going north. He, further, testified that the truck when he first saw it was a couple of feet west of the west cross-walk of Michigan avenue on Ontario street; that it was going 15 to 20 miles an hour; that the truck went on east, passed between the islands, and stopped in front of the plaintiff's automobile; that when the motor-truck passed between the islands, the automobile was 20 to 25 feet away; that he was looking but saw no signal given from the truck; that he could not stop the automobile before striking the truck; that the radiator, fenders, lights, bumper, front axle and chassis were all damaged. On cross-examination, he testified that the car to his right was several feet ahead of him and so he could not turn to the right; that the car to his left was a little back of him; that when his car hit the truck the front end of the latter was about 10 feet from the east curb of Michigan avenue, and about 5 to 6 feet north of the center line of Ontario street; that the motor-truck went straight ahead; that he, the plaintiff, was about 20 feet south of the center line of Ontario street when he began to slow down; that he threw out the clutch and put on the emergency brakes when he was about 20 or 25 feet away from the truck; that he slowed down when the truck was in the middle of, or somewhat west of the middle of Michigan avenue; that he assumed the motor-truck would stop before it got through the islands, but it did not; that he was not then able to stop in time; that his

car ran 18 or 20 feet after the brakes were set.

One Segebarth, who witnessed the accident from the southwest corner of the intersection, corroborated the evidence of the plaintiff. He testified that the truck did not stop by the islands in the center, but went right through; that it was not going very fast, but when it got in the middle, the driver seemed to put on speed. He further testified that after the accident, he followed the drippings from the ice cream truck and they showed that when the truck crossed it did so without stopping, as there was no pool as there would have been in case of stopping. On cross-examination, he stated that he saw a stream of water flowing from the truck while it was traveling; that the truck was going about five miles an hour; that when the truck passed the center of Michigan avenue, the plaintiff's car was 20 feet away; that the front end of the car struck the rear end of the truck; that the plaintiff's car was going about 25 miles an hour.

One, Erma Hedine, who witnessed the accident from the third floor of the building at the northeast corner of the intersection, testified that the truck did not stop; that then it went fast; that it did not stop when it got to the center; that there were machines going north but none going south; that they were very close, about 15 to 18 feet apart; that the truck went right straight through; that the plaintiff's car was in between two others; that the front part of the truck hit the right side of the plaintiff's car.

One, Topp, who was at the southwest corner of the

intersection, testified that the truck went directly into Michigan avenue without stopping; that it did not stop at the island; that it was going about 15 or 20 miles an hour. The daughter of the plaintiff, who was in the car with her father, testified that the truck came into Michigan avenue, and let some southbound machines pass; that they thought it stopped for them too, and they kept on going; that her father put on the brakes but could not stop in time; that the driver of the truck gave no signal.

The driver of the truck, and a man who was riding with him, testified for the defendant. The driver testified that he stopped on Ontario street when he reached Michigan avenue, going east; that then he started in first speed; that he continued straight east at two or three miles an hour; that plaintiff's car was going about 25 to 30 miles an hour; that he swung the truck north to an angle of 45 degrees. On cross-examination he stated that there were only two cars coming from the south, that they were near Ohio street to the south and were going about 25 to 30 miles an hour. He further testified that he knew they had the right of way coming from the "left" (sic) but one of them started to slacken up so he kept on going; that he was going to cover 100 feet while they covered 150 feet; that there was no island in Michigan avenue at that time; that he did not stop before passing over the center of Michigan avenue; that the plaintiff's car was about 40 feet behind the car east of it; that he was about in the middle line of Ontario street when crossing; that the car west of the plaintiff's passed the truck at the rear. The man riding with the driver of the

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Interesting, Bailiff, that you should mention Jasper Hardy-Jones (first emphasis). Just it so happened he was lurking very, if not quite, near to the scene of the crime, the daughter of the plaintiff, who is in the car with her father, testified that the crash came when lightning crossed, not the more pertinent rainbow yonder, then they thought it stopped for them too, and they took on noting that her father was on the phone but could not stop to ring; that was the driver of the truck gave no signal.

The driver of the truck, and I ask the jury pardon such lady, testified for the defendants. The driver testified that he swerved on Cumulus avenue from the I-Longed Highway avenue, going south that then he observed in first speed that he continued swerving east at two or three miles an hour that plaintiff's car was going about 35 to 40 miles an hour that he swung his truck north to an angle of 45 degrees. On cross-examination he admitted that there were only two cars coming from the south, that they were more than several in the north and were going about 25 to 30 miles an hour. He further testified that he knew they had the right of way coming from the "left" (sic) but one of them overtook to slacken up so he kept on noting that he was going to carry 100 feet while they covered 180 feet; that there was no hazard in Highway avenue at that time; that he did not stop before passing over the centre of Highway avenue; that the plaintiff's car was about 40 feet behind the car west of him; that he was about in the middle line of Dakota street when, assuming that he was west of the plaintiff's passed at least of the lane. He was riding with the driver of the

truck testified that the truck was going toward the lake; that he was sitting on the right hand side; that it stopped before entering the boulevard and then started across; that the truck went slow all the way, blowing the horn; that the plaintiff's car did not change its course; that it went straight ahead, changed its speed and went faster; that when the collision occurred the front wheels of the truck were right at the edge of the boulevard; that the truck was struck on the right hand side, right back of the front wheel.

It will be seen that there is a serious conflict in the testimony. Topp says the truck did not stop at Michigan avenue and that it went straight on from 15 to 20 miles an hour. The plaintiff said it was going 15 to 20 miles an hour, gave no signal and went straight through but stopped in front of his car; that he put on the brakes and threw out the clutch at once. Segeberth said the truck went straight through, that he saw the marks of the dropping water right straight across; that when it got to the middle, the driver seemed to put on speed. Erna Bedine said it did not stop at the center, and that it went fast. If the trial judge believed the plaintiff and his witnesses, their evidence justified the charge of negligence. Considering Michigan avenue was a boulevard, that automobiles were going north practically three abreast, the situation was one that required of the driver of the truck, according to the testimony for the plaintiff, more care than he exercised, and the collision was, in reality, the result of his carelessness. Partridge v. Eberstein, 225 Ill.App. 209. We do not feel, such being the situation, that the judgment of the trial judge was manifestly against the weight of the evidence.

The third contention is that damages were not properly shown. Ewald, however, testified to the fair and reasonable value of certain items, and, also, as to the cost of the labor. That was sufficient. Pauling v. East End Garage, 227 Ill. App. 603; Moyer v. Plastic, 231 Ill. App.183. Complaint is also made that this witness, when testifying, was referring to a statement which purported to show the number of hours of labor required in making the repairs. Of course, the witness could not recall the number of hours and the statement itself, if properly testified to by the witness, was admissible. Koch v. Pearson, 219 Ill. App. 468.

The fourth contention is that the judgment is void for uncertainty. The common law record shows that the judgment was entered for $234.39, and that record as to what the judgment was, takes precedence over the recitation in the bill of exceptions. Diving v. Chicago City Railways Co., 169 Ill. App. 498; Roche v. Seldam, 119 Ill. 320; Allman v. C.P. & M. R. R. Co., 155 Ill. 17.

Finding no error in the record the judgment will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

238 - 29327

CHIC-MINT GUM COMPANY,
a corporation,

Appellee,

v.

HECHT NIELSEN,

Appellant.

237 I.A. 648

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Apr. 29, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Chic-Mint Gum Company, brought suit in the Municipal Court against the defendant, Hecht Nielsen, in an action of the first class, upon an account for goods sold and delivered, moneys expended, and interest, claiming a balance due, after allowing certain credits of $1,069.39. The defendant in its affidavit of merits denied $423.80 of the amount claimed, and filed a setoff covering certain amounts for price readjustments, commissions, warehouse rent and clerk hire, railroad fare, loss on goods sold at plaintiff's direction, war tax, and money paid and not credited; and claimed a net balance due of over $4,000.00. The plaintiff filed an affidavit of merits to the defendant's setoff.

There was a trial, with a jury, and at the close of all the evidence, the trial judge upon his own motion, directed the jury to return a verdict for the plaintiff in the sum of $761.54. A verdict was rendered accordingly, and judgment entered thereon. This appeal is therefrom.

The Chic-Mint Gum Company, plaintiff, was a Delaware corporation with headquarters in Wilmington, Delaware. The defendant was manager since July 1919 of its western branch, and had his offices in Chicago. The plaintiff shipped its goods, chiefly certain forms of chewing gum, in carload lots, to the defendant in Chicago where they were stored and charged to the defendant. The defendant had authority to sell plaintiff's goods in Illinois, Indiana, Wisconsin, Michigan and Chicago. At their direction he, also, shipped goods to other points outside of his specified territory. For his services, the defendant was to receive 10% commission on what he sold. When the merchandise was sent on from Wilmington, it was invoiced directly to the defendant. Between July 1919 and June 10, 1921, a large amount of business had been transacted between the plaintiff and defendant. Some question arose in the early part of 1921 in regard to their mutual accounts, and after some correspondence, the President and the Secretary-treasurer of the plaintiff, came to Chicago, and, together with the defendant, went over matters and arrived at a settlement, whereby it was agreed that the defendant owed the plaintiff $425.46. That was settled on June 10, 1921, by the defendant giving his check for that amount and the plaintiff receipting therefor. Subsequent to June 10, 1921, and prior to April 4, 1922, on which latter date the defendant was dismissed as agent or manager of the western agency, a certain amount of business was transacted between the parties, and, as a result, conflicting claims are now made as to the true state of the account between them. The plaintiff

claims that there is a balance due it of $1,088.39, and the defendant, while admitting some parts of what is claimed by the plaintiff, sets up by statement of claim of setoff that there is a balance due him of something over $4,000.00.

We shall first consider the scope and effect of the settlement of June 10, 1921. If that included and legally satisfied in full all matters of account between them up to that time, then it will only be necessary to consider the accounts which subsequently arose. Prior to June 10, 1921, a dispute had arisen as to the disposition of the merchandise which the defendant had on hand, and, also, as to the amount which was due from him to the plaintiff. After certain telegrams in March, 1921, by the plaintiff to the defendant in regard to the warehouse in Chicago where the merchandise should be placed, the defendant in March, 1921, wrote to the plaintiff as follows:

> "I have had my account looked over by an accountant, and he has gone through my invoice and letters. The only difference he can find is freight allowance in some of the bills of 1919 for freight allowance. Also finds in what you call your statement, that you have given me credit for cash for the amount of $30,257.30, which is more than the last statement that I have sent you. Also find that you have charged me on Feb. 18, 1920, Folio #5442-$150.50, which I have no record of same, and goods was never r ceived by me."

On March 3, 1921, the defendant wrote as follows:

> "In answer to your several letters of recent date, we cannot find any new defects in our statement which we have sent you some time ago, but the few items we have already written you on.
> I cannot see why we have to be writing letters back and forth and not getting anywheres with same. So would appreciate to have this account settled at once. If it is necessary for you to come to Chicago and clean this matter up, you can use your own judgment in regard to same.

Trusting that we can make an early settlement so we can go on and do business in the right manner, I remain."

On March 19, 1931, the plaintiff wrote asking the defendant to deliver his stock on hand to a certain warehouse, and that it would then make out a new statement of account. In the early part of June, 1931, Kitchen, secretary-treasurer, came to Chicago and, together with one Ferris, acting sales representative of the plaintiff, met the defendant at his place of business and at the Morrison Hotel and, according to Kitchen, worked about three days, trying to arrive at an agreement as to what was outstanding on defendant's account; that he simply agreed to accept the defendant's figures and call it settled; that in doing so they used the defendant's books to obtain the final figures. Kitchen testified:

"The proposal I made to Mr. Nielsen was, he should present his figures to me showing what was due us or him at that time, and we would make the settlement. He presented those figures and I gave him a receipt. He gave me a check for $435.40 in full settlement and it balanced the account between us at that time."

The defendant testified as follows, "I was given a receipt after we had worked over these books. Mr. Kitchen and myself worked over the books, got up a statement and determined there was $435.40." After the settlement was arrived at, the defendant made a new purchase of goods, and gave the plaintiff a check for $1383.40, and in the statement showing that transaction, and which is dated June 10, 1931, and signed by the plaintiff, there is shown the item, "To balance a/c $435.40." As to the settlement, there is no claim in the pleadings that fraud was practiced; nor does

the evidence show any. There was a mutual dispute concerning the accounts between them and they met and after considerable labor and negotiations arrived at an understanding and made, what the law denominates, a binding settlement, or agreement. Where there is a bona fide dispute as to an account and after negotiations there is a meeting of minds as to the balance due in settlement, and that amount is paid by one and accepted by the other with that understanding, the account is satisfied, Jancl v. Gerny, 287 Ill. 359; Canton Union Coal Co. v. Barlin & Grandorff Co. 215 Ill. 244; Snow v. Grischeimer, 220 Ill. 106. In the Jancl case (supra) the court said:

> "The fact that the settlement was made on the wrong basis or that the defendants in error received in the settlement amounts considerably less than they were entitled to, and the lack of information as to the legal rules which should govern settlements, are not sufficient reasons for disregarding the settlement made with full knowledge of the facts."

In re Estate of Cunningham, 311 Ill. 311; Bond v. Smith, 237 Ill. App. 124.

In Hurtle Glass Co. v. N. N. Hooker Co., 120 Ill. App. 433, this court said:

> "The direction of the Court to the jury to return a verdict for the defendant was clearly right. These parties, each having full knowledge of the facts, and neither being under legal compulsion, met to settle a disputed account. After a full discussion of the claims of each at their second interview they agreed upon a contract of compromise and settlement. Thereupon the amount thus found due was paid by the one and accepted by the other, and a receipt in full was given by appellant to appellee. Having made this bargain and having received its benefits, appellant is estopped to reopen the transaction."

It is urged for the defendant that there was no waiver or release by either party to the other of anything not in defendant's book. The evidence, however, shows that they were investigating and negotiating for three days, and, it is a reasonable inference, that they considered every contractual relationship, implied or express, between them, and settled, in good faith, with that knowledge.

Assuming, as we do, that there was a full and final settlement on June 10, 1921, the question remains as to their subsequent relations. In the plaintiff's statement of claim there are 9 items of charge between January 4 and February 2, 1922. They amount to $1231.74. And there are four items of credit, amounting to $211.28, leaving a balance due the plaintiff of $1020.46. Four of the items are disputed by the defendant on the ground that he was charged 20 cents a carton, when, he claims, the price agreed upon was 18 cents.

Concerning these four items, there was conflicting evidence. The plaintiff introduced certain letters and the defendant introduced a letter and a price list on that subject, and so it became a matter of fact to be determined by the jury. That being the situation, the trial judge was not entitled to weigh the evidence, and of his own motion, direct a verdict for the plaintiff. There was an item of $187.92 for freight, cartage and storage charges that was in dispute and concerning which there was conflicting evidence. There were certain items of setoff, one of which was for commissions on merchandise claimed by the defendant to have been sold outside of Chicago. Another was for $2,750.00 claimed by the defendant for clerk

hire and for rental of the warehouse. On each of these items there was conflicting evidence. It may well be that the defendant's evidence did not in the judgment of the trial judge sufficiently prove any of the items mentioned, but it is the law that where there is any evidence, beyond a scintilla, it must be submitted to the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

It is much to be regretted that the matter may not be settled here upon this appeal, but the law prevents it.

The judgment, therefore, will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

29370

281 - 29370

CHICAGO TITLE AND TRUST COMPANY, (a corp.) Trustee, etc.,

Appellee,

v.

CHARLES F. HELLGREN, et al on appeal of ISABELLA CURRAN,

Appellant.

237 I.A. 648

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a bill of complaint filed in the Superior Court to foreclose a trust deed on the ground that a default had been made in thepayment of certain taxes. There was a reference to a Master, before whom a large volume of evidence was taken, a report, andits approval by the Chancellor, and then a final decree for foreclosure. From that decree the defendant, Isabella Curran, appeals.

It is the theory of the defendant Isabella Curran, the owner of the equity of redemption, that, although certain real estate taxes were not paid when due and although the property was accordingly sold for taxes, money was deposited with the County Clerk on February 21, 1922, which constituted a redemption from the tax sale, and as the bill of complaint herein was not filed until two days later, there was no default justifying a foreclosure.

The promissory notes secured by the trust deed in question were executed by one Hellgren and his wife on Jan-

uary 16, 1919, and were payable to their order and endorsed by them. One was for $8,000, payable January 16, 1924; one for $1,000, payable January 16, 1921, and one for $1,000, payable January 16, 1922.

The trust deed in question was executed by Hellgren and his wife on January 16, 1919, and recorded on the next day. The Trustee therein was The Chicago Title & Trust Company. By mesne conveyances the defendant Isabella Curran, on January 23, 1922, became the owner of the equity of redemption. The two $1,000 notes which became due, respectively, January 16, 1921 and January 16, 1922, were paid, and the one for $8,000, due January 16, 1924 remains unpaid.

The bill of complaint was filed on February 23, 1922, by E.G. Dunn and The Chicago Title & Trust Company, Trustee, as complainants against Hellgren and his wife, and Isabella Curran and Richard Curran, her husband, and Charles H. Simmons.

The bill alleges, among other things, that the defendants failed to perform the covenants and agreements provided for in the trust deed; that they failed and neglected to pay the general taxes for the year 1920, and allowed the premises to be sold on October 6, 1921, at a tax sale for unpaid taxes; that as a result, the complainants were compelled to pay on November 21, 1921, the sum of $669.85 to redeem the premises from the tax sale, and that by reason of the failure of the defendants to comply with the terms of the trust deed and pay the taxes, they, the complainants elected to declare the whole of the principal sum and interest secured by the trust deed to be due and payable.

The defendants filed an answer, and exceptions being made thereto and sustained, they filed an amended answer. In the latter it is admitted that the general taxes for the year 1920 were not paid when due, and that the premises were sold on or about October 6, 1921 at a tax sale; but it is denied that Z. G. Dunn was compelled to pay the sum of $669.85 for a redemption. It is therein recited further that, after the tax sale, they offered to the Hyde Park State Bank "which was active in this matter," and to the complainants through their agents, the amount of money claimed to have been paid for said redemption, and that the offer was made before foreclosure proceedings were started, but that it was refused on the ground that there was an additional sum due for attorney's fees.

It is further recited therein that upon the refusal of the complainants, by their agents, to accept the amount paid for redemption, the defendant then paid to the County Clerk a sum of money, and received therefor a redemption certificate, so that nothing remained due the complainants.

On October 19, 1922, pursuant to a petition of the Hyde Park State Bank, which set up that on May 17, 1922, it purchased from the complainant Z. G. Dunn all the principal notes and interest coupons, and which asked that it be substituted as a party complainant with the Chicago Title and Trust Company, an order was entered substituting the Hyde Park State Bank as complainant and dismissing Z. G. Dunn out of the case.

After the issues were formed, there was a reference to a Master, and on November 21, 1933, he filed his report. The important findings of the Master are as follows:

"That the owners of the aforesaid premises failed to pay the taxes levied upon the same for the year 1930, and, pursuant to law, process was issued to PATRICK J. CARR, County Treasurer and ex-officio Collector of the Revenue of Cook County, to sell said lands to satisfy a judgment entered against the same for the aforesaid taxes, together with interest and costs, and that by virtue of said process, the said Collector did sell said lands to pay the aforesaid sum, and that E. A. Deans duly became the purchaser of said lands, and that in order to protect the lien of the aforesaid trust deed, HYDE PARK STATE BANK, on behalf of Z.G.HUNN, the then owner of the aforesaid note and trust deed, did not on or about the 9th day of November, 1931, pay the sum of Six Hundred and Sixty-Nine and 85/100 Dollars ($669.85) to the said E. A. DEANS for the certificate of sale issued by the said PATRICK J. CARR to E. A. DEANS, and that by and under the terms of said trust deed, such payment, together with interest thereon at the rate of seven per cent (7%) per annum from November 9, 1931, to date, becomes a part of the indebtedness by said trust deed secured.

"That the owners of the aforesaid premises failed to pay the taxes levied upon the same for the year 1931, and pursuant to law, process was issued to PATRICK J. CARR, County Treasurer and ex-officio Collector of Revenue of Cook County, to sell said lands to satisfy a judgment entered against the same for the aforesaid taxes, together with interest and costs, and that by virtue of said process, the said Collector did sell said lands to pay the aforesaid sum, and that E. A. DEANS duly became the purchaser of said lands, and that in order to protect the lien of the aforesaid trust deed, HYDE PARK STATE BANK, the then owner of the aforesaid note and trust deed, did on or about the 15th day of January, 1933, pay the sum of Eight Hundred Forty-eight and 90/100 Dollars ($848.90) to the said E. A. DEANS for the certificate of sale issued by the said PATRICK J. CARR to E. A. DEANS, and that by and under the terms of said trust deed, such payment, together with interest thereon at the rate of seven per cent (7%) per annum from January 15, 1933, to date, become a part of the indebtedness by said trust deed secured.

" That because of the failure of CHARLES F.HELLGREN and ADA F. HELLGREN, his wife, and their assigns to keep and observe their covenants to pay the taxes upon the aforesaid premises, the complainants have elected to declare the whole of the principal sum

and interest for the debt secured by the aforesaid trust deed to be due and payable, and there is now due and owing the complainant upon said principal note due January 16, 1924, the sum of Eight Thousand Dollars ($8,000.00) and there is now due and owing the complainant the interest note due January 16, 1923, in the sum of Two Hundred and Forty Dollars ($240.00), with interest thereon from January 16, 1923, to the present date at the rate of seven per cent (7) per annum; that there is now due and owing to the complainant the interest note due July 16, 1923, in the sum of Two Hundred and Forty Dollars ($240.00), with interest thereon from July 16, 1923, to the present date at the rate of seven per cent (7%) per annum; that there is now due and owing to the complainant on the interest note due January 16, 1924, the sum of Two Hundred and Forty Dollars ($240.00), the sum of Forty Dollars ($40.00).

"That for the purpose of these proceedings, the complainant, Hyde Park State Bank, procured the foreclosure minutes from the CHICAGO TITLE AND TRUST COMPANY and incurred in that behalf an expense amounting to Eighteen Dollars ($18.00), and by and under the terms of said trust deed, the complainant, HYDE PARK STATE BANK, is entitled to recover said sum as part of the indebtedness by the said trust deed secured.

"That the sum of One Thousand Dollars ($1,000.00) is a reasonable and customary and usual fee for the services necessarily rendered and to be rendered in this cause by the complainant's solicitors and should, therefore, be allowed herein as and for the complainant's solicitor's fees, and by and under the terms of the said trust deed, the complainant is entitled to recover said sum as part of the indebtedness by the said trust deed secured."

The total amount found by the Master to be due is $11,200.50.

The record shows that on December 28, 1923, the Chancellor entered a decree approving the Master's report, except as to an interest charge, and ordering a foreclosure of the property for $11,160.13.

At the outset it is necessary for us to consider a procedural question raised by the complainant; it is claim-

ed, that as the abstract of record in this court does not contain either the decree or the objections to the Master's report, it is defective, and that the errors assigned here on review ought not to be entertained. There is no doubt that the abstract is defective, as charged by counsel for the complainant. Hatterman v. Tieman, 182 Ill. App.24; Jennet B. & L. Wks. v. Churchill, 182 Ill. App. 548; Cahill v. Printy, 138 Ill. App. 600; Good v. Lackaye, 173 Ill. App. 79. We have concluded, however, notwithstanding the omission, briefly to consider the merits.

It is contended for the defendant that an offer was made to take up the tax certificate before the bill was filed, and, also, that seasonable redemption was actually made. Evidence was offered in an effort to show that on February 21, 1922, redemption was made by a deposit of a check for $540.00 with an employee in the office of the County Clerk. Considerable evidence was offered on that subject, but we think it is apparent from the testimony of Seedorf, a deputy in the County Clerk's office, that although a check was deposited with him on February 21, nothing was done that could reasonably be considered as constituting a redemption until February 24, the day after the bill was filed and service was had on the defendant. The evidence is voluminous on that subject, but we have examined it, and have been compelled to come to the same conclusion that was reached by the Master and the Chancellor. From that, it follows that when the bill of complaint was filed the defendant was in default.

According to the terms of the trust deed, the

moment the first of July passed, the taxes being unpaid, there was a default and a breach of the contract, and from that time on, the owner of the notes was entitled to take steps to sequester the security in liquidation of the debt.

Further, the evidence shows that there were protracted negotiations between the parties, and that the solicitors for the complainant, and the complainant itself, undertook to get the matter settled reasonably, without a lawsuit.

The complainant's solicitors, after the defendant's default, wrote a number of letters, requesting payment and offering terms. On November 18, 1921, they wrote stating that the Bank had turned the matter over to them and that there was a certificate of sale, and requesting a check so that redemption could be made without delay. On December 2, 1921, they wrote again and called attention to the fact that already a number of letters had been written, and the matter had been talked over. In that letter, is the following:

> "This morning we have another communication from the bank in which they advise that this certificate must be taken up without delay. Please send us your check for $689.85 plus interest at six per cent (6%) from November 9th, 1921. Much as we dislike to do so, it will be necessary for us to begin foreclosure proceedings, unless there is a prompt adjustment."

Again on December 16, 1921, the attorneys for the complainant wrote and called attention to the fact that on December 7 a promise had been made to send a check for the balance within a week. In that letter the amount was men-

tioned as $709.87, which included $35.00 for partial preparation of the bill of complaint. It was therein stated, also, that the bill would be filed on the 19th if that amount was not paid. Again on January 18, 1922, the attorneys wrote and called attention to the fact that the complainant bank held the tax redemption certificate on which there was then due $678.11. It recited the account as it then stood, as to all that was due, including $75.00 attorney's fees. It recited, also, that the bill to foreclose was ready and "we have been advised to file same. We are writing you this letter and will wait until tomorrow to hear from you." The evidence shows that there was then sent to the complainant on January 20, 1922, a check for $1270.00, which, however, did not include the $678.11, the amount it would take to redeem from the tax sale. Other letters were later written by the attorneys for the complainant, and on January 25, 1922, they wrote restating the facts, and said that they would proceed with the matter without giving further notice. On February 15, 1923, the last letter was written. It informed the defendant that the property in question had been sold for general taxes, and stated that if a check were sent at once, a redemption certificate might be arranged for. This letter was written by one O'Connell of the real estate loan department of the bank.

In our judgment, the evidence conclusively shows that the defendant failed to carry out the terms of the trust deed, so that on February 23, 1922, when the bill of complaint was filed, the defendant being then in default, there existed

in the owner of the notes the right to declare the whole amount due, and to foreclose the property.

Some objection is made on the ground that the bill of complaint was filed in the name of Dunn and the Chicago Title and Trust Company, and that it was not shown that the bank or the solicitors at that time had possession of the notes. No such issue was made or tried. The bill alleged a default in the payment of taxes, and the answer admitted it, and the issue was whether there was a redemption before the bill was filed. There was no controversy in regard to the ownership or possession of the notes at the time of the filing of the bill.

Objection is also made on the ground that, as one of the solicitors for whose services solicitor's fees were allowed, was a stockholder and director of the complainant bank, it was error to allow any charges to be made for solicitor's fees. Counsel for the defendant cite Union Trust & Savings Bank v. Hall, 202 Ill. App. 378; Gale v. Carter, 154 Ill. App. 478. Those cases hold that directors and officers of a corporation are not entitled to charge such a corporation for legal services unless the matter of such services is covered by some by-law or resolution, or some other act of the corporation.

In the instant case, the evidence shows that Pringle, one of the complainant's solicitors, was a director and a stockholder of the complainant Hyde Park State Bank; and that one Carroll was president, and, according to the by-laws, was General Manager, and authorized to conduct the business of

of the bank. Carroll testified that he himself was general counsel for the bank; that Pringle was not necessarily attorney for the bank, but was attorney in this particular case; that; "when we have any matters like this, we turn them over to lawyers to handle. We turned this over to Mr. Pringle;" that after the taxes and interest were in default and after long correspondence with Curran about it, and they could not get a payment, "it was sent down to Mr. Pringle in due course." It would seem, therefore, from the evidence that as Carroll, the president, had authority to transact the business of the corporati n, and as he turned this matter over to Pringle and his firm for the purpose of a foreclosure, it was in the nature of special employment by the bank for that purpose. Pringle himself testified that his duty as a director did not include the carrying on of litigation as an attorney for the bank.

Considering all the evidence shown in regard to this matter, the correspondence and negotiations which preceded the filing of the bill and the services rendered, we are of the opinion that the services rendered by the solicitors for the complainant were specially rendered and it was understood by all parties that reasonable charges would be made by the solicitors for their services in the foreclosure. In Chicago Macaroni Mfg. Co. v. Mongiano, 302 Ill. 312, the court said:

> "While the principle is well established that in order to entitle an officer of a private corporation to receive compensation for the performance of the duties of his office it is necessary such compensation should have been authorized by the board of directors or by the by-laws of the company, it is also the rule that for the performance of duties or services out-

side of and apart from those imposed upon him by virtue of his office, such officer may, if such extraordinary services were rendered at the request or with the acquiescence of the corporation, recover upon a quantum meruit.'

Citing Rockford, Rock Island and St. Louis Railroad Co. v. Sage, 65 Ill. 328; Cheeney v. Lafayette, Bloomington and Mississippi Railway Co., 68 id. 570; Gridley v. Lafayette, Bloomington and Mississippi Railway Co., 71 id. 200; 21 Am. & Eng. Ency. of Law,- 2nd Ed. 309.

In Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, the following language is used:

"The rule announced in the above cases, which prohibits the payment to an officer of a corporation for services, except where a by-law or a resolution provides for such compensation before the services were rendered, has no application to any other agent whom the corporation may employ in good faith, and for a legitimate purpose; nor does it apply to an officer respecting duties not devolving upon him by virtue of the office held."

Certainly it would be unreasonable to hold that if a solicitor who happens to be a director of a bank, carries through for the bank a complicated and protracted foreclosure proceeding, with a large amount of attendant work, no charge could be made by the bank against the defendant for the legal services so performed. In view of the evidence as it is here, and the law as stated in the Barniano and Dempster cases, we feel bound to hold that the Chancellor did not err in holding that solicitor's fees were allowable.

It is contended that the sum of $1,000.00 which was allowed the complainant for solicitor's fees is ex-

cessive. The record shows that the hearings began before the Master on December 29, 1922, and continued from time to time until June 13, 1923, when the matter was finally argued before him; that there were thirty hearings, and 437 pages of testimony taken and a large number of exhibits introduced in evidence; that there were many continuances; that objections and exceptions were filed, and that the amount of the decree was, exclusive of solicitors' fees, over $10,000.00. And, besides, there was the work on the pleadings, thegetting together of the evidence, and the finding and calling of witnesses. It must be recognized that reasonable fees for legal services are much larger today than they were years ago. Burns v. Turner, 207 Ill. App. 181. In our judgment the allowance made was not unreasonable.

Some other contentions are made, but we do not think them sufficient to justify a reversal. The decree, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

300 - 22398

BRAZIL STAMPING & MANUFACTURING CO., a corporation,

Appellee,

v.

PRACTICAL DIE & SPECIALTY MANUFACTURING CO., a corporation,

Appellant.

237 I.A. 648

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. JUSTICE TaYLOR delivered the opinion of the court.

This is a suit in replevin in the Circuit Court for a Tie Checker. There was a trial before the court, without a jury, and a judgment that the plaintiff, Brazil Stamping & Manufacturing Co. retain the property replevied and recover one cent damages and costs. This appeal is therefrom.

The plaintiff in April 1923, by its President Thiffault, entered into negotiations with one Kindwall, President of the defendant for the manufacture by the defendant of a machine to make what was termed a tie checker; a tie checker being a piece of steel about an inch in diameter bent somewhat in the shape of an "S" and so made that it could be driven into a railroad tie to prevent it from spreading or splitting.

Kindwall, at the suggestion of Tiffault, went to the office of the latter and had a conversation with him in regard to the manufacture of such a machine. The plain-

tiff and the defendant had been doing business with each other for over five years. There is some controversy as to what took place at the first meeting. Thiffault testified that when Kindwall called he sent for one Kaminsky, Superintendent of the plant, and that they talked the matter over in a general way, and then went down into the factory and took the matter up with the Tie-Maker, one Sellesk; that he did not go down into the factory; that when Kindwall came back to the office with Kaminsky he, Thiffault, asked Kindwall what the price would be, and Kindwall said he did not know off-hand what it would cost, and suggested that it be figured on the basis of time and material; that he, Thiffault, said the plaintiff would not consider that; and after figuring a little more, Kindwall said to Thiffault, "I will make the machine for $1,000, and if anything it will be less than that;" that then Kindwall left and he, the witness, had no further conversation with him; that several weeks later Kindwall came in and he told him to see Kaminsky as he, the witness, had disposed of his interest in the plaintiff company.

Kaminsky who succeeded Thiffault, as president, testified that he was present at the first conversation, and that at that time they showed Kindwall rough sketches of the machine and asked him what the price would be; that Kindwall said, "It is hard telling. He preferred to have the machine made on time and material," and Thiffault said he would not agree to anything like that; that they had to know what the machine would cost; that Kindwall then said that he would guarantee "that the machine will not cost more than $1,000,

probably less than that;" that on the strength of that, they gave him an order to make the machine; that several weeks later Kindwall came in and discussed the construction of the machine; that the machine was "completed" some time in October; that Kindwall was called up on the telephone, and he said that the machine was ready; that he, the witness, told him that the plaintiff would send for it; that the plaintiff then sent its wagon and got the machine and it was then installed in the plaintiff's place, and put in operation; that the plaintiff had it in its shop for a month or six weeks, during which time it was complete and in operation; that then it started to break down, and was repaired in the plaintiff's shop by its tie maker; that they attached certain parts and repaired such things as were broken, and put on a new trip to release the clutch; that in the course of that time, while the machine was there, they pointed out to Kindwall what the defects were, and he said they would rectify them; that Kindwall was informed that the plaintiff had not yet received the bill; that he, the witness, said to Kindwall, "I asked you numerous times for it;" that Kindwall said, "I haven't got time to get to it;" that Kindwall also said, "It will cost 10% more than what I originally figured;" that he, the witness, said, "That means $100.00 more, $1,100 instead of $1,000," and Kindwall said that was what he meant; that the witness then said, "All right, I will pay $1,100, providing you will rectify all the mistakes on the machine;" that Kindwall then said to send the machine over to the defendant's shop; that he, the witness, asked Kindwall if he could fix the machine where it was, and Kindwall said, "Not very well. He would rather take it over to my place, and I will rectify

all the mistakes;" that Kindwall promised to send it back in four days, with the repairs done.

On cross-examination, the witness testified that he asked Kindwall for a bill at the time Kindwall called, and was shown the defects, so that the machine could go back for correction; that in the month or six weeks that the plaintiff had the machine it was used in the production of about 150,000 tie checkers. He further testified that Kindwall on one occasion said, " This is an experimental job and hard to figure the price in advance." "I cannot tell you what it is going to cost in advance."

The witness further testified that practically all that was done to the machine by the plaintiff's man was simply repairing bolts, or something that broke or snapped off.

Selleck, a tool maker for the plaintiff, testified that he installed the machine in the plaintiff's place of business and watched it while it was being operated; that he put on a new trip, a few bolts, and certain stops on the cutting jaws; that a few days before the machine was sent back, while he was pointing out to Kindwall the weak points of the machine,

Kaminsky asked Kindwall the price of the machine, and that Kindwall stated it would be 10% higher than he quoted. On cross-examination he said it was not an experimental job; that there were no changes made on rough drawing; that the changes that were made in the machine were a few as to the weak points; that the construction remained the same; that outside the counter that he put on, the other changes were merely repairs of parts that broke, because they were not heavy enough. On re-direct, he said that the machine was brought in the plaintiff's wagon; that he installed it, and it was complete.

Leon Kay, son of Kaminsky, President of the plaintiff, testified that he was present when Kindwall came to inspect the machine after its construction; that he heard Kindwall explaining why he had to charge 10% more; that Kindwall said, "I would like to get 10% more on this;" that Kaminsky, his father, said, "If you take this back and fix it up so that we won't have any more trouble, and repair all the weak parts, and make the several changes that have to be done, * * * I will agree to pay 10% more * * * and that will be $1,100;" that Kindwall then said, "Yes, sir, that is all right, I will send after the machine, you deliver the machine to me and I will take it back;" that his father asked Kindwall how long before they would get it back, because they needed it for their orders, and Kindwall said, "In about four days."

On cross-examination he testified that he talked on the telephone with Johnson (secretary and treasurer of the defendant company) and that Johnson said, "I know this is a valuable machine and I could sell it to a lot of people, but

I will let you have it. It cost a lot more money. You can have it, but I'm not going to let it go out unless we get the full price we are asking, $1,943.47;" that on the day the machine was taken by the sheriff, he said to Johnson, "I have a check here for $1,100, if you want it;" that Johnson said, "I should say not, because this machine don't go out of here unless we get the full price of $1,943.47." that the sheriff then took the machine.

The testimony for the defendant, being that of Kindwall and Johnson was, as regards the conversation that occurred concerning the price, contradictory to that of the witnesses for the plaintiff. Kindwall testified that in his first conversation with Kaminsky, after Kaminsky had become president of the plaintiff company, he told him that he could not say what the machine would cost until it was planned out and built up; but that he originally said to Thiffault that it looked like the machine could be built for $1,000; that Thiffault said it ought not to cost more than $400 or $500; that some weeks later, Kaminsky called him up and said he was going to have the machine built; that he had bought out Thiffault; that he was not the Brazil Stamping and Manufacturing Co.; that he told Kaminsky that he had been thinking it over and concluded that he, the witness, would have to make another plan, and that he would be back in a few days; that later at various times he showed Kaminsky plans which Kaminsky O.K.'d; that Kaminsky said, "Go ahead;" that he told Kaminsky he would not build a machine for a stipulated price; that it would have to be done on a $1.80 basis an hour and 10% on the machine; that Kaminsky said, "Anyway you want, Kindwall;" that they were going to write out a contract, but none was ever made

out or signed; that on one occasion Kaminsky asked if he would guarantee it would not cost more than $1,000, and he told Kaminsky he could not guarantee it; that that was the reason he wanted a time and material job; that that was the last conversation he had in regard to the price.

He further testified "that when the machine was built, was practically finished," he called up Kaminsky and told him to have his mechanic come out to see if there was any change to be made in regard to its construction; that the mechanic did go out and make certain recommendations and the defendant acted on his suggestions; that that was in the early part of September 1923; that the defendant then ran the machine a couple of days in its shop; that the machine ran a few times before it was taken to plaintiff's place of business, which was in the third week in September; that it was at the plaintiff's place of business about four weeks; that while it was there, one Schweider of the defendant company, a mechanic, did some work on the machine. When asked if there was any arrangement as to when the machine was going to be taken back to the defendant's shop, he answered, "Well, we did not take up the point when the machine was going to come back to us, or sent back, we spoke about taking up the machine, give it a good tryout to find out the weak points, and then take the machine back and finish it up;" that they "talked along that line;" that that was about the third week in September just before the machine was turned over to the plaintiff; that a mechanic of the defendant worked on the machine in the plaintiff's shop, and it was put in a running condition; that he told the mechanic to do whatever the plaintiff told him to do. He

further testified that about four weeks afterwards he went over to see Kaminsky about the machine and said to him, "Do you understand this machine will run up quite a bit of money?" that Kaminsky asked him how much, and whether it would be 5 or 10%; that he told Kaminsky that he could not say, as he had not had time to check over the figures; that possibly it would be 10% of the $1,000; that he thought the machine could be built for that the first time they talked about it, although he did not say it would be built for that. He further testified that there were not many changes to be made in the general construction of the machine, only reinforcements to make certain weak parts stronger, after they took the machine back; that it took five or six days for two men to make the changes; that the defendant had certain men work on it after it was taken back; that when they got through, he called up Kaminsky and told him that the machine was done, and that he would like to have a couple of bars to try out the machine; that that was the Friday before it was taken on the replevin writ. He further testified that after they had figured out the price, he and Johnson went to show it to Kaminsky; that the statement amounted to $1900 and some odd dollars; that when it was shown to Kaminsky the latter said, "Do you mean to tell me you can come here and ask $1900 for the machine when you agreed to make it for $1100?" that he then told Kaminsky that he had never made any such agreement. On cross-examination he testified that Kaminsky examined the machine at the defendant's place of business before it was sent over; that he wanted the machine, and he, the witness, told Kaminsky that the plaintiff could take the machine, and that would give the defendant an opportunity to find out whether it would work

satisfactorily. He further testified that on the telephone he told Kaminsky, "A mistake is done, I admit that. Don't you ever make a mistake yourself? That machine maybe could be made for a thousand dollars, but that don't mean that I made the machine for a thousand dollars;" that he admitted he made a mistake in his original figures; that he never told them expressly that it would cost a thousand dollars.

Johnson, the secretary and treasurer of thedefendant company, testified that after the machine was back in the defendant's shop, he talked with Kaminsky over the telephone, and when Kaminsky asked theprice, he, the witness, told him it was $1943.47; that Kaminsky wanted the machine delivered and he, the witness, said it would not be delivered until they settled on the price; that Kaminsky said he would not pay $1943.47 as Kindwall had estimated it at around $1000 and he would be willing to pay $1100 or so; that Kaminsky further said, "Well, we need that machine; we can settle about the price afterward, send themachine over;" that he, the witness, said, "As long as they are in an argument on the price, we will hold onto the machine until it is settled." He further testified that the next conversation he had with Kaminsky was when he and Kindwall went to the plaintiff's plant, the day before the machine was replevied; that at that time Kaminsky said that Kindwall originally wanted to make the machine around $1,000, but that when he got to making it there was a lot of experimental work; that Kindwall then wanted to take it on a time and material basis; that he, Kaminsky, then said, "That is all right with me, let it go on time and material;" that he, the witness, tendered defendant's bill to Kaminsky; that

Kaminsky looked at it and said that he had no doubt that it was correct, but Thiffault advised him not to accept it; that at the time the sheriff was there to replevy the machine, someone along with Kay and the deputy sheriffs, said he was willing to pay $1100; that nothing, however, was tendered. There was offered in evidence a cost sheet showing that the time and material put on the machine after it was returned to the defendant from October 26 to November 7, 1923, was $244.74. The witness further testified that nothing had been paid to the defendant on the price of the machine. The witness, Schweider, tool maker for the defendant, testified that he heard Kaminsky when he first came after the machine tell Kindwall that the plaintiff had about 150,000 pieces that they wanted to get out on a certain order; that Kindwall said that would be a good chance to try the machine out and run it to find out the weak points, and then after that they would take the machine back to his shop and remedy its defects; that he, the witness, worked on the machine at the plaintiff's shop about three days altogether; that Kaminsky told him the machine was not working right; that he, the witness, told Kaminsky that there might be a little trouble and that they would try to rectify all the mistakes, but that would take time. On cross-examination, he testified that when the machine left the defendant's shop the first time, all the parts were there, and it worked, although in his judgment, a certain lever was a weak spot, and that he experimented with it.

It is contended for the defendant, that the title to the machine never passed to the plaintiff, and that, accordingly, it was not entitled to possession, and replevin would

not lie. In our opinion, the evidence shows that the title passed to the plaintiff when the machine as a practically completed machine was delivered. Meacham on Sales, Pars. 489 and 493. Rule 4 of the Sales Act, Part II, Par. 22, Cahill's Rev. Stats. of 1933, is as follows:

> "Where there is a contract to sell unascertained or future goods by description, and goods of that description, and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

Kindwall, in his testimony having reference to the machine just before it was taken over to the plaintiff's shop, used the words "when the machine was built, was practically finished." When it was taken over, it was in a deliverable state and, as far as we can make any reasonable inference from the conduct of the parties, "unconditionally appropriated to the contract" by both of them. It was delivered, and not only was it set up at the plaintiff's place of business for four weeks, but in that time it was operated by the plaintiff in the course of his business in the manufacture of a large order of something like 150,000 tie checkers. Considering that it was delivered and set up and so used, it would be unreasonable, with the evidence as it is, to conclude that it had not been delivered pursuant to agreement and become the property of the plaintiff itself. Mount Mono Iron Co. v. Buffington, 103 Mass. 62. It is true that while it was in use on the plaintiff's premises, there were some minor parts that broke, and some that needed strengthening or slightly changed, but when delivered it was a workable machine and was used successfully for the

purpose for which it was made and delivered. The fact that after the first job was done it was sent back to be repaired or have some alterations made, does not even tend to show that the title had not already passed.

One of the arguments for the defendant is that it refused to catty out its contract to sell the machine; that although there may have been abreach of contract, still replevin would not lie, and the following cases are cited: Haveratick v. Fargus, et al 71 Ill. 105; Updike v. Henry, 14 Ill. 378; Richardson v. Hardin, 88 Ill. 124; Honeycutt v. Lego, 180 Ill. App. 237; Low v. Freeman, 12 Ill. 467.

An examinati n of those cases discloses that in four of them the property was never delivered and the other was a case in trover; so that they are all inapt.

It is contended that, as the defendant got lawful possession of the machine when it was sent back after it had been used, the plaintiff was bound, before he had the right to replevy, to make a demand. The evidence shows a demand was made; and even if it did not, as it does show that a demand would have been unavailing, under the law a demand became necessary.

In Kee & Chapell Company v. Penn Co., 291 Ill. 348, the court said:

> "While demand is usually necessary where the defendant comes into possession of the goods rightfully, yet where the circumstances show that demand would be unavailing such demand is not necessary."

This court said in Nat. Bond & Investment Co. v. Zekos,

230 Ill. App. 609:

> "The object of a demand is to afford the defendant an opportunity to restore the property to the one entitled to possession without being put to the expense and annoyance of litigation. But where it appears that the defendant either before the action was instituted or upon the trial contests the plaintiff's rights upon the merits, or where it appears that a demand would have been of no avail, then none is required, for the law never requires the doing of a useless thing. Citing, Wells on Replevin, sec. 373; Grant v. Kroger, 22 Ill. 74; Sinsamker v. Ross, 62 Ill. App. 118; Freehill v. Hueni, 163 Ill. App. 118; 34 Cyc. 1405, 1410; Guthrie v. Olson, 44 Minn. 404; Satterthwaite v. Lillie, 188 N.C.67; Thompson v. Thompson, 11 N. Dak.308; Webster v. Brunswick-Balke-Collender Co., 37 Fla. 433."

It is further contended that the defendant had a lien in the sum of $244.74 for work and labor furnished after the machine was taken back, but inasmuch as we hold that the title passed at the time of the original delivery of the machine, and the work done on the machine after it was taken back was not in the nature of repairs, but was done in the way of finishing the manufacture of the machine, the defendant was not entitled to retain possession of the machine by reason of the contention here made, whether the agreement of the parties involved a fixed price or was on a cost plus basis. It is not necessary to decide here the controversy between the parties as to that part of their contract pertaining to the price, and so we do not pass upon thatquestion.

It is further contended that the court should have entered an alternative judgment to the effect that the plaintiff pay what, if anything, was due within a given time, or return the property. We do not think Sec. 22 of the Replevin

Feb 12th. Nov. 1901.

Act applies. Peck v. Hubbard, 4 Ill. App. 566; Smith v. Hyberg Automobile Works, 177 Ill. App. 18.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

67 - 29154

THE UNITED STATES ASPHALT REFINING CO., a corporation,

Defendant in Error,

v.

HENRY G. GOELITZ,

Plaintiff in Error.

237 I.A. 648

ERROR TO CIRCUIT COURT, COOK COUNTY.

Opinion filed April 29, 1935.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant, Goelitz, seeks to reverse a judgment for $2,096.40, recovered against him by the plaintiff Company, in the Circuit Court of Cook County. The plaintiff sued the defendant in assumpsit, to recover a sum alleged to be due it from the defendant, as the purchase price of a certain quantity of asphalt cement, alleged to have been purchased by the defendant from the plaintiff. The contract between the parties, made in January 1920, called for 250 tons of cement, in drums, F.O.B. plaintiff's refinery at Baltimore, Md. The shipments made by the plaintiff to the defendant, under this contract, were short some 25 tons, but this shortage is not involved in this case, nor does the defendant make any complaint of the quality of the 225 tons which were shipped. However, it is the defendant's contention that the drums in which the cement was shipped were defective, resulting in the asphalt escaping and spreading over the ground, after it had been unloaded from the cars, and this resulted in dirt and foreign materials getting into the cement so as to affect its value. Under the contract,

the place of delivery of the material sold was on board cars at the plaintiff's plant. The evidence in the record is to the effect that all the asphalt cement so delivered to the defendant was, at the time and place of such delivery, in containers which were in first class condition. The manager in charge of the plaintiff's plant at Baltimore, testified that the asphalt in question "had been placed in new drums and these drums were in perfect condition * * * when they were placed on the cars for shipment." The foreman of the plaintiff's shipping gang testified that each drum involved in the shipments to the defendant, were personally handled by him,- "I handled every drum sent to Coelitz. Everyone of these drums were new drums in thebest possible condition and had never been used before." The superintendent of the freight yard, having especial charge of the loading and shipping plant of the plaintiff Company at Baltimore, testified that he "saw the asphalt that was sent on all the Coelitz orders, and observed that the packages or drums were in first class condition when loaded on the cars at our plant. I observed carefully every drum shipped from our plant and would not permit a defective drum to leave the plant." There is no direct evidence in the record to the contrary. A witness for the defendant testified that when the asphalt was unloaded at La Grange, Illinois, the containers were badly rusted at one end, and that when the weather got warm, about the first of June, the asphalt softened up and began to flow, and they had to bank sand around it so as to keep it from running all over the ground. This witness further testified that they did not use the asphalt until some time in October, and that he thought they lost about

[illegible] of delivery of the material data can be found more on the plaintiff's plans. The evidence in the record is to the effect that all the conduit comes to delivered to the defendant and, at the time and place of such delivery, in compliance with which were in first class condition. The concern in charge of the plaintiff's plans as testimony, positively that the conduit in question had been placed in new boxes and there were kept in perfect condition " " " when they were placed on " " for shipment." The foreman of the plaintiff's shipping room testified that such boxes removed in the shipment in the defendant, were personally handled by him." I handled every box sent to Seattle. Everyone of these boxes were new boxes in the best possible condition and never been used before." The superintendent of the freight yard, testified [illegible] [illegible] of the loading and shipping plans of the plaintiff company as follows, testified that he "saw the conduit that was sent on all the Seattle orders, and observed that the packages - boxes were in first class condition when loaded on the cars at our plant. I observed particularly every [illegible] from our plant and would not permit a defective box to leave the plant." There is no direct evidence in the record to the contrary. A witness for the defendant testified that when the conduit was supposed to be drawn, Illinois, the conductors were badly knotted up in one end, and that when the machine got was a, about the first of June, the conduit was [illegible] and up and rugged to flow, and they had to work great amount in so as to keep it from running all over the ground. This witness further testified that they did not use the conduit until some time in October, and that he thought they lost about

20 tons at La Grange. He testified that the same conditions prevailed with respect to the balance of the asphalt which was unloaded at Austin. This witness testified that the asphalt in question was unloaded by the defendant in March. The defendant wrote the plaintiff a letter, dated April 26, saying that the material in question had just been received and that remittance would be sent for it "in a few days. We ask you to kindly allow us a little more time on the same." Under date of June 22, the plaintiff wrote the defendant, calling attention to the invoices covering the asphalt in question, and requesting payment. A similar letter passed between the parties a month later, under date of July 22. Not until after the receipt of these two requests for payment of the account did the defendant make any complaint about the shipment. Under date of July 28, the defendant wrote the plaintiff saying that if the defendant "had known the condition of the packages which contained this asphalt, we would never have paid the freight on the same. The packages were no good and the asphalt is running all over the prairie, and we wish we had had nothing to do with the asphalt." If the containers of this asphalt were in the condition testified to by the defendant's witnesses, when they were unloaded in March or April, the evidence shows it to have been a simple matter for the defendant to have so handled the material as to suffer no loss. It seems rather strange that it should take the defendant nearly two months after the asphalt began escaping from the containers, according to his testimony, before he took occasion to complain about its condition, and that this did not happen until three months after he had requested time within which to pay the account, and until after he had

received at least two urgent requests for payment. In any event, there is no evidence in the record, except such inferences as might have been drawn from testimony as to the condition of the drums at the time of unloading, which may be said to contradict the positive testimony of three or four witnesses, to the effect that these drums in which this asphalt was contained were new drums in perfect condition at the time and place of delivery, under the contract between the parties.

The defendant complains of a ruling of the trial court sustaining plaintiff's objection to the offer of a letter by the defendant. This letter was written to the defendant by the plaintiff under date of March 17. It was from the plaintiff's western sales manager, and advised the defendant that the plaintiff at Baltimore had wired "they will be short 35 tons on your shipment to Austin, as drums are in such condition that they do not feel safe in risking shipment, consequently total amount shipped you on your order for 250 tons will be 235 tons." The argument presented by the defendant in this connection, is that the letter was competent, as tending to show that the plaintiff had acknowledged the defective condition of at least a part of the containers and it indicated at least the possibility that some of these defective containers were used in connection with the asphalt which was shipped. In our opinion, the ruling complained of was not erroneous. If the letter indicated anything it was that the plaintiff was defaulting on the contract, as to quantity, rather than risk shipment in defective containers, which would tend to show that the plaintiff was unwilling to ship except in con-

tainers in good condition. In our opinion, the defendant may not successfully contend that the letter was evidence which should have been submitted to the jury, on the question of the condition of the containers of the asphalt which was shipped. The writer of this letter had died prior to the trial of this case and the defendant contends that the trial court sustained the plaintiff's objection to it on that ground, but an examination of the record discloses that the court expressly stated that he was not excluding the letter on that ground. The defendant also offered in evidence a letter addressed to him by the plaintiff's western manager accepting the defendant's order "for 250 tons asphalt cement in drums — 80 to 85 penetration — at $16.00 per ton FOB our refinery, Baltimore, Md., shipment to be made previous to March 15th. Terms, net 30 days." The court, on objection, excluded this letter also. We are unable to appreciate the materiality of this letter. The record does not disclose that any dispute existed between the parties as to the terms of that contract. At the time the letter was offered in evidence, the record discloses, counsel for the defendant stated that it was being offered to show "there were 250 tons ordered. It is going to be very material why they did not ship the balance * * * We intend to show the reason they did not ship the balance was because the containers were not proper and fit." Nothing that was contained in that offer made this letter material. That the contract called for 250 tons and there were only 225 tons shipped, were facts which were admitted and involved no dispute. As indicated above, the fact that part of the material contracted for was not shipped, owing to the fact that it was in defective containers, which the

plaintiff was unwilling to send out, does not indicate that the material which was shipped went out in defective containers. If it indicates anything it is that the care being exercised by the plaintiff was such that no material was shipped unless the containers were as testified to by the plaintiff's witnesses.

In support of this writ of error, the defendant contends that the trial court erred in entering judgment against the defendant individually, the contention being that it appears from the evidence that the sale was made, not to the defendant as an individual, but to "Henry G. Goelitz Co." In our opinion the record does not bear out that contention. In connection with his testimony the plaintiff's sales manager testified that he was familiar with the contract which his company had with "H. G. Goelitz of Chicago, who did business as H. G. Goelitz Company." This testimony was not objected to nor was it contradicted in any way. Goelitz himself, while on the witness stand, testified, as shown by the abstract, "I have been in the ashpalt paving business since 1913," and further, "When these containers arrived at my place, I saw them immediately after they were unloaded." And in another place during the trial the defendant stated that the asphalt in question was "unloaded at my plants at La Grange and Austin." The defendant's superintendent testified that he was superintendent of the plant "for Mr. Goelitz, the defendant." Another witness testified that he saw some of the asphalt "in the yard of Henry G. Goelitz." This witness further testified, "If you were fully equipped as Goelitz is at his plant," and so on; and this witness made a number of other references to

the equipment which he said Goelitz either had or did not have at his yard. No evidence was offered, showing or tending to show that there was ever a corporation known as H.C. Goelitz Co., or contradicting the evidence to the effect that Goelitz was in business individually under that name.

The defendant contends that the court excluded some evidence which was offered tending to show that asphalt which had escaped from containers and run over the ground and become mixed with foreign materials, was defective. Questions were asked of a witness for the defendant, as to what effect asphalt, containing such foreign material, would have on machinery in connection with which the asphalt was used. The court declined to permit proof as to damage to the machinery, holding that this was in the nature of special damages and that such was not permissible under the pleadings. As we read the record, the defendant received all the benefit he was entitled to, of any evidence that was offered along this line. The testimony which was received left no doubt of the fact that after asphalt became mixed with foreign materials, as it would be after running over the ground, it would not be in good condition.

The jury found the issues for the plaintiff and assessed its damages at $2098.40, and "interest at 5 per cent." The bill of exceptions shows that the trial court entered judgment on the verdict "for $2098.40." The judgment as written up in the common law record, was a "judgment entered on verdict in favor of plaintiff and against defendant for $2098.40

with interest at 5 per cent, together with costs." The defendant complains that the allowance of interest was erroneous. This question becomes of no importance because the plaintiff is not asking for interest. Plaintiff's counsel states in his brief that in order to avoid any question about the sufficiency of the judgment, so far as interest was concerned, the allowance of interest was waived upon the hearing of a motion for a new trial, and at that time the court ordered judgment entered on the verdict for $2098.40, as shown by the bill of exceptions. The appeal bond in the record recites that the plaintiff has recovered a judgment against the defendant for the sum of $2098.40 and costs, from which defendant has appealed. Apparently the appeal in connection with which this bond was furnished, was not perfected and later this writ of error was sued out.

The defendant contends further that the trial court erred in connection with the giving of certain instructions. We do not consider any of the points urged in this connection of sufficient importance to refer to them in detail in this opinion. We have carefully examined the instructions, in the light of the contentions made, and in our opinion there was no error committed by the trial court with regard to them.

For the reasons stated, the judgment of the Circuit Court in favor of the plaintiff for the sum of $2098.40, and costs is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

81 - 28168

GEORGE E. JENNER and FLORENCE J. JENNER,

Appellees,

v.

A. J. SCHORSCH and MARY C. SCHORSCH,

Appellants.

237 I.A. 648

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants, A. J. and Mary C. Schorsch, seek to reverse a judgment for the sum of $250.00 and costs, which the plaintiffs recovered against them in the Municipal Court of Chicago.

In May, 1922, the plaintiffs entered into a written contract with the defendant Mary C. Schorsch, wherein they undertook to buy and she agreed to sell a piece of property on which the defendants agreed to erect a bungalow, which would be a duplicate of one which was standing on the adjoining piece of property belonging to the defendants. Under the terms of this contract the plaintiffs agreed to pay $7700.00 for the property - $500.00 on the execution of the contract, $500.00 when the roof was on the bungalow to be erected, $500.00 on the completion of the bungalow, and the balance in monthly installments. The bungalow was to be completed in July. Some changes were later made in it and the time for the completion of the building was extended to September. At or about the time the building was ready for

occupancy, the plaintiffs concluded to withdraw from the deal. The defendants contend that the building was entirely finished, with the exception of a few odds and ends which could be completed in less than a day, and that the plaintiffs were notified that they could move in; but that the plaintiffs said that inasmuch as the bungalow was not entirely finished they would not move in, and they demanded the return of their money. Plaintiffs contend, on the other hand, that when the bungalow was about ready for occupancy the defendant, A. J. Schorsch, told the plaintiffs that he did not want them in the place and to come and get their money.

The plaintiffs paid the defendants $500.00 on the signing of the contract, and $500.00 more when the bungalow was under roof. The sale of the property to the plaintiffs was brought about through some real estate agents known as Padden Brothers, and of this $1,000.00 which the plaintiffs had paid on the contract, Padden Brothers received $350.00 from the defendants as their commission. When the plaintiffs told the defendants that they were not going to go ahead with the purchase, and requested the return of their money, the defendants paid them $750.00, explaining that the balance of $250.00 had been retained by Padden Brothers as a commission. The plaintiffs brought this suit against both Padden Brothers and the defendants to recover that $350.00, - the plaintiffs claiming that the situation in which they found themselves had been caused by the actions of the defendants. The plaintiffs dismissed the suit as to Padden Brothers, before trial.

The plaintiffs included in their claim certain other damages in the sum of $141.00. The latter were apparently disregarded by the trial court and they are not referred to by the parties on this appeal.

When the plaintiffs received the $750.00 from the defendants, a memorandum was written across the face of the contract of purchase which they executed and which they both signed, the memorandum reading as follows: "For and in consideration of the sum of $750.00 in hand paid, receipt whereof is hereby acknowledged, we assign, release and quit claim all our interests in the within contract to Mary C. Schorsch." The $750.00 was paid to the plaintiffs by a representative of the defendants in the form of a check bearing an endorsement reading: "Endorsement is payment in full for all claims, rights, title and possession contained in certain contract dated May 22nd, 1922, between Mary C. Schorsch, and George Edgar Jenner and Florence J. Jenner, his wife, for the purchase of 6115 Byron Street, Chicago, Ill." This endorsement was also signed by the two plaintiffs. At the same time the two plaintiffs executed a quit claim deed covering the property, whereby, for an expressed consideration of $10.00, they conveyed and quit claimed all their interest in the property back to the defendant, Mary C. Schorsch.

It is the contention of the defendants that the acceptance of the $750.00 by the plaintiffs amounted to an accord and satisfaction of their claim, and that they therefore are not in a position to recover the amount for which the trial court entered judgment. The plaintiffs contend,

on the other hand, that where a claim is being made for a liquidated amount, the acceptance of a check for an amount less than that which is due in an acceptance pro tanto only and does not satisfy the claim. As stated by our Supreme Court in Snow v. Griesheimer, 220 Ill. 106, "The law is, that where the amount due a creditor is ascertained and not in dispute, the payment by the debtor and acceptance by the creditor of a less sum will not operate as a satisfaction of the demand, but if the amount due is unliquidated or there is a bona fide dispute as to how much is due, a payment of the amount claimed by the debtor to be due, in full settlement, if accepted by the creditor, is a satisfaction of the claim." The contention of the plaintiffs above referred to, has no application to the facts in this case, as it might have, if the evidence showed that the plaintiffs' claimed that the defendants were obliged to return to them the full thousand dollars, and further that the defendants admitted that obligation. Even the testimony submitted in behalf of the plaintiffs did not make out that sort of a case. The plaintiff, George Jenner testified that when he and his wife went to the office of the defendant A. J. Schorsch to get the money, the latter was not there but his brother was and that when he gave the plaintiffs the check for $750.00 he said, "Jenner, all the money I have of yours is $750.00. Padden Brothers have the remaining $250.00. * * * you go to Padden Brothers and get the rest." The testimony of this witness further shows that he accepted the $750.00, and apparently intended to follow the suggestion just referred to, and go to Padden Brothers and request the return of the sum they had received as a commission on the deal. The plaintiff, Mrs. Jenner, gave similar testi-

mony. She testified that when they withdrew from the contract, the brother of A. J. Schorsch said, "You understand I have $750.00 of your money and you will have to go to Padden Brothers." Another witness testified that she heard a conversation, which occurred six months after the plaintiffs withdrew from the contract and requested the return of their $750.00, which conversation took place in the office of the defendant Schorsch, in which some man, not clearly identified by the testimony but presumably the defendant A. J. Schorsch, or his brother, told the plaintiff, Mrs. Jenner, that "You are entitled to the $250.00. Mr. Padden has got it and we have not got it."

Instead of the evidence showing that the defendants were not disputing their obligation to pay back a thousand dollars to the plaintiffs, as the latter seem to contend here, the evidence really shows that the defendants only undertook to pay the $750.00, they had and the plaintiffs did not dispute that position or make any claim at the time that the defendants were liable beyond that undertaking. On the contrary, they accepted the $750.00 from the defendants, in full payment of the defendants' obligation. That is evidenced by the memorandum they signed on the face of the original contract, by the endorsement they signed on the check they received, and by the fact that they executed a quit claim deed conveying all interest they might have in the property, back to the defendants. The evidence also shows that as to the other $250.00, they expected to go to Padden Brothers and get it from them. In this connection the plaintiffs further contend that they accepted the $750.00 on condition that they were

to receive the balance of $250.00 from Padden Brothers, and that the defendants agreed to assist them in getting that balance from Padden Brothers. There is no such evidence in the record. The plaintiff Jenner testified that when the broker of A. J. Schorsch told him that all the money they had of the plaintiffs was $750.00, and that the plaintiffs could go to Padden Brothers and get the rest, he, (Jenner) said, "Did you ever have any trouble with Padden Brothers in regard to that," and that Schorsch said they had not,- "You will have no trouble getting your money;" and that with that understanding the contract was turned in. Mrs. Jenner testified that in this conversation her husband said, "Will I have any trouble to get the other $250.00," and that the reply was "We never had any trouble." She then added, "We thought if he (Schorsch) was so anxious to get rid of us, we would sign the contract (release) and not have any trouble to get the $250.00."

The substance of the situation is this. The plaintiffs had paid the defendants $1,000.00 on this deal, and for some reason the deal fell through, and apparently by mutual consent it was regarded as off, and the plaintiffs requested the return of their money and the defendants said, in substance, that they had $750.00 of the plaintiffs' money, but that the balance of $250.00 had been paid to Padden Brothers as a commission, and if the plaintiffs wanted that they would have to go and get it from Padden Brothers. The plaintiffs then asked whether there had ever been "any trouble with Padden Brothers in regard to that," and the reply was in

the negative, and apparently the brother of the defendant, Schorsch, with whom the conversation was being had, expressed the opinion that the plaintiffs would be able to get Padden Brothers to give up their commission. The plaintiffs made no complaint about being required to get Padden Brothers to return the balance of their money. Under the evidence, they unquestionably received the $750.00 as payment in full of whatever obligation the defendants had in the premises, and at no time took the position that there was $250.00 more coming to them from the defendants. Under such circumstances, the question of accord and satisfaction has no application. When the plaintiffs received this $750.00, they received it as payment in full of an indebtedness, the amount of which was not in dispute, all parties treating that as the extent of the defendants' obligation, and when they signed the memorandum on the contract, and the endorsement on the check, they acknowledged receipt of the debt, in full, so far as the defendants are concerned.

For the reasons stated the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

91 - 29178

THADDEUS MORAWSKI,
Defendant in Error,
v.
V. SEKO TRADING CO., a corp.,
Plaintiff in Error.

237 I.A. 649

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant Company seeks to reverse a judgment for $10,000 recovered against it by the plaintiff in the Superior Court of Cook County. The suit brought against the defendant by the plaintiff was one in which he sought to recover damages occasioned by injuries received by him, and alleged to have been caused by the negligence of an employee in driving one of the defendant's trucks.

The plaintiff was a boy eleven years of age who had always enjoyed good health up to the time he received the injuries complained of. He was run over by the defendant's truck as it was passing out of a north and south alley on the north side of 113th street, and half a block east of Michigan avenue in the City of Chicago. At this point, 113th street slopes to the east. The accident in question occurred on an afternoon in December about four o'clock. The ground was covered with snow and the plaintiff was on a small sled going east down the hill, in the space between the sidewalk on the north side of 113th street and the curb, this space being referred to in the record as the grass plot or parkway. The

evidence shows that there was a building on the northeast corner of 113th street and Michigan avenue, the front of the building being on Michigan avenue and the side of the building being on 113th street, at the building line, which was about a foot inside of the sidewalk line. There was a solid board fence along the north side of 113th street and extending from the rear end of this building, at the building line, east to another small building, which was located at the northwest corner of the alley and 113th street. This small building was used as a plumbing shop and fronted on 113th street and the side of the building bordered on the alley and extended back from 113th street for a distance of about 25 feet.

In sliding down the hill in the parkway on the north side of 113th street, the plaintiff ran a few steps and then threw himself forward, so that he was lying on his sled on his stomach. There was apparently not sufficient incline to enable him to go very rapidly. A woman who testified for the plaintiff, was walking east on the south side of 113th street at the time of the occurrence in question and she said that as the plaintiff went down hill, on the opposite side of the street from her, he was going about as fast as she could walk. It further appears from the evidence that the plaintiff did not have sufficient momentum, as he was going down the hill, to enable him to keep going, but that he had to give himself a push ahead every now and then with one of his feet.

The plaintiff testified that he started from Michigan avenue down the hill; that he ran a few feet and then fell on

his sled, "and when the sled slowed up I would have to push it more;" that he was not on the sidewalk, but was sliding along in the space between the sidewalk and the curb referred to as the grass plot; that when he reached a point about a yard and a half from the alley curb, he looked "kitty corner" into the alley, and listened but that he neither saw nor heard anything, and that he went on and when he was within a foot of the alley curb, he again looked up the alley and he then saw the defendant's truck approaching, about in the middle of the alley, which was about 28 feet in width, and at that time the truck was about 30 feet away. As to this distance between the plaintiff and the defendant's truck, at the time the plaintiff first saw it, he testified further, it was "near the back end of Bradley's store," - the small building used as a plumbing shop at the corner of the alley. At another point he explained that "it was farther back than the telephone pole, about as far back as the automobile seems to be in defendant's Exhibit 3." From that description it is possible to determine this distance between the plaintiff and the truck, according to the plaintiff's testimony, at the time he first saw it, pretty accurately. It seems to be clear that the plaintiff was at least 10 feet south of the front of the plumbing shop. The building occupied by this shop was 20 feet long. The telephone pole mentioned by the witness was at least three feet north of the north end of the plumbing shop, and the automobile shown in the photograph in Exhibit 3, was standing at a point at least 20 feet north of the telephone pole, so that according to the plaintiff's testimony, when he first saw the de-

fendant's truck approaching him, it was at least 30 feet and possibly as much as 50 feet away from him. He says in another point in his testimony that it was "almost as far away as the other end of the court room, where I am sitting on the witness stand."

It appears further, from the testimony of the plaintiff that as soon as he saw the truck and when he was within about a foot of the alley curb, he threw his sled "over to the side facing north, so that I would not get in front of the truck." Apparently the boy tried to throw his sled around so that the runners would be at right angles with his line of travel, and thus prevent his sliding out into the alley in front of the truck. The plaintiff's sled went beyond the alley curb and into the alley about a foot and a half. He testified that as the truck approached him it swerved to the west, which would be in his direction, and then to the east as it proceeded out of the alley and turned east into 113th street. The right front wheel of the truck struck the plaintiff below the hip, breaking the thigh at about the middle and crushing the muscles and nerves. The truck came to a stop about 15 feet beyond the plaintiff. The plaintiff testified that the whole thing happened very quickly and that he got the impression that the truck was going very fast.

One Sophie Hall, the witness who was walking east on the south side of 113th street, testified that as the plaintiff was approaching the alley she saw a truck coming out; that

when she first saw it, it was about 25 feet from the sidewalk, coming south in the center of the alley; that it was going about 20 miles an hour and that it stopped as it got into 113th street, facing east, but that it did not stop prior to reaching that point. She testified further that she did not hear the truck make any noise; that the plaintiff was on the grassplot and when he saw the truck he turned his sled toward the sidewalk and "was between the grassplot and the sidewalk when he was struck," that he was about five or six feet from the corner of the building (plumbing shop) when he turned his sled and that "he turned his sled quick." On cross-examination she testified that when she first saw the truck it was about at the rear end of the plumbing shop, and that when the plaintiff turned his sled, before the accident, he slid sideways and was struck by the right front wheel.

One Elmer Molin testified that he was walking west along the north sidewalk in 113th street, half way between the alley and Michigan avenue, when the plaintiff passed him on his sled and at that time the plaintiff was about in the center of the grassplot, and was moving a little bit faster than the witness was walking. This witness described the way the plaintiff was going, by saying that "he helped himself along, pushing with one foot." He further testified that he heard no noise from the truck and that he did not see the accident, but he heard the plaintiff call and turned around and saw him "just at the edge of the sidewalk, at the north end of the grassy plot. The automobile had moved on to turn east on 113th street. It was then going pretty fast, but it stopped just around the corner of the alley."

The only testimony submitted by the defendant was that of the chauffeur. It appears from the briefs that this case has been submitted to three juries and that in each instance the issues have been found in favor of the plaintiff. It appears further that at the first two trials the chauffeur testified personally, but that he died prior to the third trial and that at this last trial the testimony given by him at a prior trial was read to the jury. The defendant's truck was what is known as a right hand drive. The chauffeur's testimony was to the effect that he was driving about four miles an hour, in the center of the alley, and that when he got along side of the plumbing shop he sounded his horn and stopped; that this horn consisted of a whistle attached to the exhaust on the motor and operated by means of a string, and he stated that it could be heard a block away. His testimony was further to the effect that he stopped a little north of the intersection of the alley and the sidewalk, at a point where the front end of the truck was even with the front end of the building in which the plumbing shop was located; that there was a distance of three feet between the front of the truck and the wind-shield, and that as he sat in his seat, at the time the truck was standing still, he could not see any one in the street; that he stopped there approximately a minute and a half; that he noticed he had a clear road in front of him, and he put his motor into first speed and started up; that he was not going even as fast as a slow walk; that he did not see any boys and that he had not gone eight feet when he heard someone "holler"; that he stopped right then and there

and saw the plaintiff lying with his sled at the rear of the truck. His testimony was that when his truck was stopped the second time, after the accident, the front of it was even with the curbstone and that the rear wheels were still on the crosswalk.

Two of the counts of the plaintiff's declaration were based upon an ordinance of the City of Chicago, declaring it to be unlawful for any person to drive a vehicle out of an alley onto a public thoroughfare, without bringing such vehicle to a complete stop before driving across the sidewalk or crossing at the alley entrance. No demurrer was interposed to these counts. During the course of the trial the plaintiff offered this ordinance in evidence and it was received without any objection being interposed by the defendant. One of the instructions given by the court to the jury, included this ordinance, butnno error has been assigned as to that. The only reference to the ordiance by counsel for the defendant is one made in the course of the argument presented in his brief, where it is urged that the argument made by counsel for the plaintiff with regard to this ordinance and its application, is in applicable to the facts presented by the evidence, for the contention is that it is not shown, even if it be assumed that the truck did not stop, that such failure to stop was the approximate cause of the accident; that even if the truck had stopped still for some appreciable length of time and then started up, the accident would probably have happened anyhow, because it occurred, not before the truck

stopped or should have stopped, but after it had started up and was proceeding out of the alley. In our opinion, that argument is not sound. In the case of Hilderbrand, Administrator v. Baldwin, Illinois Appellate Court, First District, case No. 28488, opinion filed June 11, 1924, not yet reported, which was a case in some respects similar to the case at bar, we had occasion to hold that this ordinance was void, basing our decision on the decision of our Supreme Court in Ellis v. Adams Express Co., 300 Ill. 340. We are, of course, obliged to decide the questions presented on this writ of error, on the theory of the case as it was presented in the trial court. As is pointed out above, no question was there raised by the defendant as to this ordinance. It was assumed by both parties that the ordinance was valid and no objection was raised to it, either as pleaded or as offered in evidence or as referred to by the court in the instructions, and no error has been predicated on the ordinance in any way in this court.

The defendant contends that the evidence does not show that its chauffeur was negligent. That, of course, was a question of fact for the jury, and we cannot say that the finding of the jury to the contrary is against the manifest weight of the evidence. The defendant complains further that there was no evidence in the record to support the count in the plaintiff's declaration, which charged wilfull and wanton negligence and that it was error on the part of the trial court to submit the case to the jury on that count, with the others. In our opinion no error was committed in that regard. As our Supreme Court said in Nelldren Express and Van Company v. Krug,

291 Ill. 472, "Whether the negligent conduct of a defendant which has resulted in injury to another, amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury. An intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a willful injury." As the defendant's chauffeur approached the exit from the alley in which he was driving the truck on the occasion in question, his view to the west along 113th street was cut off by the plumbing shop and other structures to the west, until he was about to emerge from the alley. It was incumbent upon him to foresee that persons or vehicles might be approaching his line of travel along 113th street, either on the sidewalk or beyond that, and it was his duty to use reasonable care in an effort to avoid running into anyone. This duty of his was of course entirely apart from any legislative act on the subject. If the jury believed from the evidence that the chauffeur was driving his truck in the center of the alley, which was nearly 30 feet in width, and that the plaintiff came into view on his sled, when the truck was over thirty feet away, and that the plaintiff only slid out into the alley a distance of a foot and a half, and that the chauffeur, anticipating turning east into 113th street, steered his truck over to the west, thus bringing the plain-

tiff into the path of the truck, and the plaintiff was struck by the right front wheel and apparently run over, and, as the chauffeur himself says, he did not even know the plaintiff was there, we are of the opinion that they were justified in concluding that the defendant was guilty of willful and wanton negligence. In other words, there was evidence in the record to the effect that that was what happened and therefore it may be said, in the language of the Supreme Court, in the case above referred to, that the record does contain evidence "fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury." The evidence which tends to show that such was the situation, was that given by the plaintiff and by the woman across the street. Of course, the evidence of the chauffeur was directly contrary, but his testimony is flatly contradicted in a number of instances by allthe witnesses in the case, testifying as to the occurrence, and in our opinion the jury were not unreasonable in disregarding it. Three witnesses said that the truck came out of the alley at a rapid rate of speed and did not stop until it had turned to the east in 113th street. The chauffeur says he came out of the alley very slowly and after the plaintiff was struck he came to a stop, with the rear wheels of his truck still on the crosswalk. The chauffeur says he came to a full stop inside the building line at the alley entrance. Two witnesses say he did not even reduce his speed as he came out of the alley. The chauffeur says he sounded his shrill whistle, which could be heard a block away. Three witnesses testi-

fied that they heard no sound at all.

The defendant contends further that the plaintiff was guilty of contributory negligence, as a matter of law. Of course, any such contention is wholly untenable. At most, it was a question of fact for the jury. This case does not present a situation where a vehicle emerged at an intersection and a plaintiff came crashing into it from a side direction, without warning, as counsel seems to argue. The plaintiff could not have been going at a rapid rate. As his sled moved along, it appears that it would have come to a dead stop, except for the fact that he gave it a push now and then with his foot. It did not proceed over the curb into the alley more than a foot and a half. The plaintiff did not see the truck until he was within a foot of the curb. He, therefore, brought his progress to the east to a stop in two and one-half feet. The alley was an unusually wide one, nearly 30 feet, and the chauffeur had more than ample room to pass the plaintiff, but apparently his attention was so fixed on his turn to the east that he paid no attention to the question of whether anyone was approaching him, but swerved to the west, in preparation for his turn to the east, without looking. Where an object is in plain sight, as the plaintiff was when the truck was 30 feet north of the alley entrance, we must presume that if the chauffeur had looked he would necessarily have seen him, but his own testimony was that he did not see him.

The contention is made that in connection with his argument to the jury, counsel for theplaintiff indulged in such prejudicial remarks as should alone, call for a reversal of this

judgment. Some of the statements made in the course of the argument were objectionable and objections which were interposed at the time were sustained and the jury was instructed to disregard them. Some of these remarks appear more objectionable when set out by themselves and removed from their context. The arguments of counsel to the jury are included in the bill of exceptions, in full, and as we read the argument of counsel for the plaintiff, as it appears there, we are of the opinion that nothing was said which could reasonably be used as a ground for disturbing the judgment. It would serve no useful purpose to go into these matters in detail here.

Further complaint is made by the defendant about certain of the instructions what were given to the jury. In one of these instructions the court told the jury that it was the duty of one in the position of the defendant's chauffeur "to be on the lookout and take reasonable measures to avoid injuries to persons on the public streets." The contention is made that this amounted to telling the jury that the law imposed upon the chauffeur anabsolute duty to be on the lookout and take reasonable measures to avoid injuries to others and that the instructions should have been to the effect that it was the duty of the operators of automobile trucks on the public streets,"to use due care" to be on the lookout and "to use due care" to take reasonable measures to avoid injuries to others. It is difficult to appreciate the distinction between telling the jury that it was the duty of the chauffeur to take reasonable measures to

avoid injuring others, and telling them that it was his duty to use due care to take reasonable measures to avoid injuring others. In our opinion, the phrase which counsel contends should have been incorporated in the instructions, would have been quite superfluous. There is no error in the instruction as it was given.

Complaint is made of another instruction, in which the court told the jury, in substance, that owners of automobile trucks had no right to use the public streets in such a manner as to prevent their proper use by others, or to operate their trucks at such a speed as to be incompatible or inconsistent with such use, and the court added that in giving that instruction there was no intention to give or intimate any opinion as to the management of the truck in question, but it was for the jury to determine the facts from the evidence; and further complaint is made of a similar instruction in which the court told the jury that the drivers of automobile trucks while using the public highways, streets and alleys must have due regard for others and use reasonable efforts to avoid injury to others. The contention is that these instructions should have told the jury that it was the duty of the driver of the truck, to use due care in its operation so that injury would not result to the plaintiff or any person lawfully present upon the highway. Again we have difficulty in detecting any substantial difference between the meaning of the language, which it is contended the instructions should have contained and that which they did contain.

The language contended for by counsel for the de-

fendant, in our opinion, merely puts the statements as the court made them in the instructions, in a little different way.

Complaint is also made of an instruction given by the trial court, on the question of damages, in which the court told the jury that, "In determining the amount of damages the plaintiff is entitled to recover in this case for physical injuries, if any, the jury have a right to, and they should, take into consideration the facts and circumstances as proved by the evidence before them as to the nature and extent of plaintiff's physical injuries only, if any, so far as the same are shown by the evidence to be the direct result of the injury, suffering in mind and body, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, he has sustained or will sustain by reason of such injuries; and may find for him such sum as in the judgment of the jury, under theevidence and instructions of the court in this case, will be a fair compensation for the injury he has sustained, or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration of any count thereof, and are proven."

In contending that the giving of this instruction was erroneous, counsel for the defendant refers to the case of Levitan v. Chicago City Ry. Co., 203 Ill. App. 441, where, it is contended, the same instruction was given and criticised

by this court. The instruction involved in the Levitan case was materially different from the instruction complained of here. In the case cited the instruction given specifically provided that in considering the question of damages, the jury might consider the plaintiff's loss of time and inability to work, if any, on account of the injuries complained of, and it was pointed out that there was no proof in the record as to any loss of time or inability to work, resulting from the injuries, and therefore, that the evidence was not such as to warrant the giving of the instruction. Counsel also cites the case of Hopkins v. Whalen, 217 Ill. App. 248. The instruction involved in that case told the jury that if they found certain things therein specified, they should find the defendant guilty and assess such damages "as you shall believe the plaintiff to be entitled to from the evidence in this case." It was pointed out that this instruction had repeatedly been condemned where the plaintiff was not entitled to punitive damages, because it not only would authorize punitive damages, if the jury thought the plaintiff was entitled to them "but also would turn the jury loose to determine for what damages should be awarded, without any guide from the Court." In our opinion, the instruction involved and comment made by the court in the Hopkins case, may not reasonably be said to have any application to the instruction complained of here. In the latter instruction, the jury are confined, in their consideration of the question of damages, to the physical injuries of the plaintiff, as a basis. The jury are not told, as they were in the Hopkins case, that if they found that the plaintiff was entitled to damages, they might assess

them at such an amount as they believed the plaintiff was entitled to, from the evidence, without any guide from the Court, but, on the other hand, the jury were told to confine themselves to the physical injuries, if any were shown by the evidence, and by that instruction the Court carefully guided them in such elements as they might take in consideration in determining what the damages might reasonably be for such injuries. Incidentally, it might be noted that the defendant in this case has assigned no error to the effect that the damages are excessive, nor is any argument advanced by counsel to that effect. In this connection, the evidence showed that in addition to the breaking of the thigh, the plaintiff suffered such a crushing of the muscles and nerves as to result in a partial paralysis, which, the testimony showed was a condition that would be permanent. At the time of the trial there was a marked wasting of the right leg and a considerable flatness of the hip, there being a difference of one and one-half inches in the circumference of the two thighs. The injuries also resulted in some curvature of the backbone. The paralysis was confined to the right leg between the thigh and the knee. This condition greatly limited the use of the limb. As the attending physician put it in his testimony, "It is not a walking limb in my opinion," and he also gave it as his opinion that this was a permanent condition. The plaintiff was obliged to use crutches at the time of the trial, which was in December 1922, the injuries having been received just three years prior to that time.

For the foregoing reasons, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

29189 F

101 - 29189

JAMES G. DAVIS, Director General of Railroads, Appellee, v. EDWARD F. McKENNA and LUTHER S. MICKEY, JR., Co-partners doing business as McKenna and Mickey, Appellants.	237 I.A. 649 APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants McKenna and Mickey, seek to reverse a judgment for $2,748.56, recovered against them by the plaintiff Company, in the Municipal Court of Chicago.

This appeal has been consolidated for hearing in this court, with case No. 29188, in which we are this day filing an opinion. The facts and issues involved in the case at bar are in all respects the same as those presented in the other case and it will therefore not be necessary to again set them forth here. For the reasons we have given in the opinion filed in that case, the judgment of the Municipal Court appealed from in the case at bar is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views set forth in the opinion filed in case No. 29188.

JUDGMENT REVERSED AND CAUSE REMANDED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

34211

122 - 39211.

EMERY THOMPSON MACHINE & SUPPLY COMPANY, a corp., Appellee, v. ILLINOIS HYDROX COMPANY, a corp., (formerly) HYDROX COMPANY, Appellant.	237 I.A. 349 APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Emery Thompson Machine & Supply Company, brought this action in the Municipal Court of Chicago against the defendant, Hydrox Company, seeking to recover a balance claimed by it to be due from the defendant for a quantity of ice cream freezers, which it had sold and delivered to the defendant. There was a trial of the issues involved, before the court without a jury. The court found the issues for the plaintiff and assessed its damages at the sum of $21,655.18, and entered judgment for that amount, in favor of the plaintiff. To reverse that judgment the defendant has perfected this appeal.

The plaintiff Company is a manufacturer of ice cream freezers in New York. The defendant Company is a manufacturer of ice cream in Chicago. The president of the plaintiff Company, Emery Thompson, and the president of the defendant Company, T. H. McInnerney, had known each other for twenty-five years or more at the time the trans-

actions were entered into which form the basis of this suit. For some years they were associated in business together, with McInnerney as the employer and Thompson as the employee. Prior to the transaction involved in this suit, the plaintiff had manufactured ice cream freezers of a forty gallon capacity. The defendant Company was building a new plant in Chicago and intended to equip it with freezers of that capacity. Thompson, while in Chicago attendingthe Dairy Show in the fall of 1918, called upon McInnerney and suggested that the defendant Company would economize its space and better its equipment if it installed freezers of 120 gallon capacity in its new plant. As a result of this conference, the details of which we shall not go into here, the defendant gave the plaintiff an order for 10 Emery Thompson Freezers of 120 gallon capacity. Although the plaintiff had not manufactured freezers of that capacity up at that time, Thompson assured McInnerney that they were in a position to do so; that they had the drawings and patterns and that the 120 gallon freezers would be just like the 40 gallon freezers in type, and would differ only in the matter of the size of the different parts. At that time delivery was promised for August, 1919. The first freezer was delivered in the fall of that year, but was not set up at that time because the defendant did not got into its new plant until May, 1920. All ten freezers involved in this order were delivered and set up in the new plant of the defendant at about the time the plant was ready for occupancy, (May, 1920) and from then on they were operated by the defendant in the manufacture of ice cream. Before long the defendant began, to have trouble with the operation of the freezers. We shall refer to this sub-

ject hereafter. In the fall of 1920 the defendant ordered six additional freezers of the same type. These were delivered and installed in the defendant's plant in the spring of 1921, and for the remainder of that year the defendant used the 16 freezers in connection with the operation of its business. The trouble which the defendant was experiencing with the operation of the freezers continued and this occasioned the ordering of parts from time to time, which the plaintiff furnished. In the spring of 1921, the plaintiff sent out new cylinders or all ten of the original order of freezers.

Shortly after the plaintiff began making deliveries of its first order, it billed the defendant for the machines delivered, and it continued to send the defendant bills, from time to time, and the record also contains letters written by the plaintiff to the defendant urging the latter to give its attention to these bills. The freezers were sold to the defendant at a special price of $1800, each, the list price being $2750; the plaintiff taking the position that it would be good advertising to get such a substantial order of its machines into a well known plant, such as the defendant's. The defendant made three remittances to the plaintiff, one of $5,000, in December, 1920, one of $2500, in June, 1921, and another of $2500, in July, 1921. The plaintiff continued to furnish the defendant with parts, from time to time, and on two or three occasions sent a man from New York to the defendant's plant in Chicago, to install these parts and make repairs.

Early in December, 1921, the plaintiff wrote the defendant a letter saying that if the balance due from the defendant was not paid by the tenth of that month, the plaintiff would feel obliged to place the matter in the hands of their lawyers for collection. After receipt of the letter McInnerney went to New York and had a conference with Thompson. In the course of this conference something was said about the need of the defendant for some additional parts, whereupon, Thompson stated that the plaintiff was not going to furnish the defendant with any more parts in compliance with their orders, until the defendant had paid its bill; and that any parts furnished in the future would have to be paid for in advance. McInnerney went over the troubles the defendant had been having in the operation of the freezers, and Thompson discussed the reasons he felt accounted for those troubles. Finally, McInnerney stated that there was nothing for the defendant to do but return the machines to the plaintiff, for the defendant was not willing to accept them, whereupon Thompson stated that the defendant had accepted them and that the plaintiff would not take them back. Thompson maintained that the defendant should pay its bill, and McInnerney assured him that the defendant had no intention of paying the bill, because the freezers were not satisfactory and the defendant would have to discard them for "We certainly can't take a chance with business another season with machines that will not stand up."

In February, 1922, the plaintiff started this suit. The defendant continued to use the machines in question, in the operation of its plant, for some months thereafter. The

testimony shows that the defendant took out four of the Thompson Freezers sometime in the spring of 1922 and the last of them early in the fall of 1922. When they were taken out the defendant placed them in its storage room and as they were removed from the plant, freezers of another make were installed in their place, by the defendant.

The freezers in question were of what was known as a horizontal type. The body of the freezers was cylindrical in form and there were two cylinders. The inner one was the receptacle in which the material to be frozen was placed. Within this inner cylinder were beaters which stirred the cream while it was freezing. The beater rods were fastened on frames at each end by means of bolts. These beater rod frames communicated with a bushing at the end of the freezer, by means of four bushing pins which fitted into four holes in the cross pieces making up the frame of the beater at the end. The other end of the bushing was attached to gears by means of which the power was communicated from the motor to the bushing and from the bushing on to the beater. The connection from the gear-shaft to the motor was by means of a chain. The head at the end of the freezer was held on by tie-rods and between the head and the body of the cylinder there was a rubber gasket. Between the inner cylinder, and the outer cylinder, there was a chamber in which a brine solution was circulated, which was the means of freezing the material in the inner cylinder. The inner cylinder was made of German silver, and there was a joint the length of the cylinder where the material had been welded.

In support of its appeal the defendant contends; (1) that the freezers did not comply with the plaintiff's warranty; (2) that they were not accepted by the defendant; (3) that they were worthless for the purpose of manufacturing ice cream, and had only a scrap value; and (4) that the defendant was entitled to recoup its damages caused by the breach of warranty. In the course of findings of fact which were expressly held, thetrial court found that the freezers "were warranted by the plaintiff to operate in a satisfactory manner and as well as any other machine in the market" but the court also found that the freezers "did operate in a reasonably satisfactory manner" and that they "were reasonably fit for the purpose of freezing ice cream and were operated and used by the defendant in its business of freezing ice cream, until the fall of the year 1932," and that they therefore complied with the plaintiff's warranty. If these findings of fact held by the trial court may not be said to be against the manifest weight of the evidence, we need not concern ourselves with the question of whether the machines were accepted by the defendant, for in such event the defendant would not be entitled to return them, nor with the question of whether the defendant was entitled to recoup its damages, for in such an event there would be no breach of warranty, nor could it be said that the freezers were worthless for the purpose of manufacturing ice cream. In our view of the case, the issues presented on this appeal may be determined by a consideration of the single question as to whether the finding of the trial court, to the effect that the freezers were reasonably fit for the purpose of freezing ice cream, and that they

-4-

operated in a reasonably satisfactory manner, was a finding which may be said to be against the manifest weight of the evidence. We have carefully considered all the evidence in the record and have reached the conclusion that it may not be said that the findings of the trial court were against the manifest weight of the evidence. In connection with its argument to the contrary, the defendant contends that the plaintiff not only guaranteed that the freezers would be reasonably fit for the purpose of freezing ice cream and that they would operate in a satisfactory manner and as well as any other machines in the market, but that they were to be considered the plaintiff's "unless they absolutely give you satisfaction." The plaintiff denied making any such representation. The question of whether it was made was not the subject of any finding of fact submitted to the trial court. In our opinion, the contention that the plaintiff made such a representation may not be said to be borne out by the record, because of the many things done by the defendant, which were entirely inconsistent with any such theory. We shall have occasion to refer to these things later. The defendant seeks to explain them by pointing to the long friendship of the presidents of these two companies, and their former business association, but, for reasons we shall also refer to hereafter, we are of the opinion that the course of conduct of the defendant disclosed by the evidence, may not be thus satisfactorily explained.

The evidence admits of no doubt of the fact that the defendant used the freezers purchased from the plaintiff, a

throughout the summer season, when their business was the heaviest in the years 1920, 1921 and 1922, in making large quantities of ice cream. In 1921, the defendant's output was about 1,500,000 gallons, and in 1922, it was about 300,000 gallons more than that. It is clear from the evidence that the bulk of that output was the product of the Emery Thompson Freezers. The defendant had three plants, the main one being the new plant opened in May, 1920, where the plaintiff's freezers were installed. This plant included, in addition to the plaintiff's freezers, seven Creamery Package Freezers of forty gallon capacity. The defendant's chief engineer testified that when the second lot of freezers purchased from the plaintiff were installed in this plant in the spring of 1921, these Creamery Package Freezers were taken out and were never in service after that time. The defendant's superintendent testified, however, that these Creamery Package Freezers were taken down in the winter of 1920, but were put back in operation in March 1921. It appears from the cross-examination of the chief engineer, that these Creamery Package machines were taken out when the first freezers purchased from the plaintiff were installed, and later they were put back in operation, and after that they were again taken out and were never operated after the second lot of freezers purchased from the plaintiff were installed. Just how long they were operated after the plaintiff's machines were first installed does not appear. Even for such period as these Creamery Package machines may have been in operation in this plant, they were only one seventh the capacity of the Thompson freezers, and for the balance

of the period the entire product of this plant came from the Thompson freezers. The defendant had another plant on the north side of the city where, the testimony shows, there were no machines in 1921 and 1922, and a third plant in South Chicago where they operated five forty gallon machines. It will thus be seen that even when we take into consideration the breaking of parts which the defendant experienced with the Thompson machines, and the times the machines were out of use, by reason ofthe necessity of repairs, it still is clear that much the greater part of the defendant's production, for the period during which it was using the Thompson freezers, was the product of those freezers. The evidence is further to the effect that in 1920 the defendant's profits amounted to over $110,000; in 1921 to over $255,000, and in 1922, to nearly $400,000. When the defendant was using these freezers to the extent we have indicated, in manufacturing such large quantities of ice cream and was making, such substantial profits, it may not be successfully contended that these freezers were worthless for the purpose of manufacturing ice cream, and that the only value they had for the defendant was a scrap value.

That the defendant experienced numerous breakdowns in the operation of the plaintiff's freezers and that various parts repeatedly gave way, occasioning the necessity of supplying new parts and shutting the machines down while repairs were being made, is likewise clearly established by thesevidence in the record. These breaks occurred in the case of the chains, which communicated the power from the shaft of the motor to the gear shaft; the gears, the teeth of which would give way, -

resulting in stripping the gears; the bushing pins which fitted into the holes at the ends of the beater frames,- the pins shearing off; the beater rods or bars, which separated from the cross pieces at the ends; the gaskets, which permitted leaks of the brine into the cream, at the cylinder heads; and it was also contended that nickle plating peeled off from the inside of the heads and got into the cream and that oil leaked through from the gear boxes and got into the cream.

As to the chains; the plaintiff's president testified that when complaints reached him from the defendant, he took the matter up with the manufacturer of the chains and the latter said he would like to have a sample of the chains that had broken. Such sample was procured from the defendant and sent to the manufacturer. Thompson testified that he told the defendant the manufacturer would do nothing about the matter, but the plaintiff would, nevertheless, replace the broken chains. He further testified that he told McInnerney that the reason the manufacturer would not replace the chains was that they found, upon inspecting the broken chain which had been sent to them as a sample, that it had never been lubricated. That the defendant had been operating these freezers without any lubrication on the chains which supplied the power, is shown, not only from the testimony referred to, but by a letter from the defendant company, dated September 15, 1920, addressed to the plaintiff, in which the defendant says, "We do not know where Mr. Pearson, our former engineer, got the idea from, but he did have the idea that the chains on the freezers did not need lubrication. Whether this was passed

along to our ice cream factory people to save himself some work or not, we do not know, as he is no longer in our employ and we cannot question him on the subject."

As to the gears; it appears from the record that the first ones supplied were castings and later the plaintiff supplied die cut gears. It was the contention of the plaintiff, which finds support in the evidence, that the stripping of the gears which was experienced by the defendant in operating these freezers, frequently was due to overloading the freezer, - that is, the plaintiff contended that the defendant ran the machine too long and until the cream became so stiff and hard that it was impossible for the beaters to revolve in it. Testimony on this subject was to the effect that when this was done something had to give way and this resulted in stripping the gears or breaking the bushing pins or the beater rods or bars. The defendant's general manager testified that the defendant's practice was to allow the fluid to remain in the freezer container from eight to fifteen minutes before discharging the frozen product from the freezer, this length of time varying with different kinds of freezers and the temperature of the brine; that in the case of the Emery Thompson Freezers, it was the defendant's practice to keep the fluid in the freezer "from fifteen to twenty minutes and sometimes longer" before it was discharged as completed ice cream; that this was the practice at the time the defendant began the use of the Emery Thompson Freezers, and was necessitated by a deficiency in brine capacity. This witness further testified that they discharged the cream from the cylinder of the freezer

at a temperature of about twenty-two degrees. For the plaintiff, one Ballard, a mechanical engineer, with some thirty years experience, who had specialized in refrigeration during all that time, testified that the cream ought to be removed from the cylinder at a temperature between twenty-seven and twenty-eight degrees, in order to prevent it freezing to such a degree of hardness that the paddles or beaters could not turn, which would cause some part of the machine to break. This witness further testified that if the cream was allowed to remain in the cylinder of the freezer until it reached a temperature of twenty-four degrees, it would be pretty stiff cream and would affect the machinery, by putting an extra stress on it, and would be an overload, "causing the weakest part to break or the motor to stop." This witness had occasion to visit the defendant's plant for the purpose of examining the refrigerating system, at the solicitation of the defendant, the latter claiming they were unable to get their product out because of a lack of efficiency in the system. He further testified that while he was engaged in this work at the defendant's plant, he saw the employees taking cream from the freezers and that it was too stiff; that in one instance he observed that the freezer was run thirty-five minutes in connection with a single operation, which, in his opinion, was "putting undue strain on the working parts of the machine. * * * If the cream is in too long so it freezes too hard there would be a tendency to strip the gears. It also might break the scrapers. It is hard to tell what those blades had to cut into when the temperature

was 24 degrees and if the cream on the walls of this cylinder got too stiff something would have to break and the weakest part would have to give." One of the employees of the plaintiff, Polak, came out from New York once or twice to make repairs on the plaintiff's freezers. He testified that while he was at the defendant's plant he noticed that "the cream was hard and the motor kept on running and the pinion gear stripped," and that he called this matter to the attention of the chief engineer. He further testified, "On several occasions I saw the cream frozen very hard. It was frozen so hard that the spaddles could not move."

In the first freezers delivered by the plaintiff, the bushing pins were all bronze and one half inch in size. They were later changed to steel pins five eighths of an inch in size. As we read the evidence in the record the defendant seems to have had as much trouble with broken bushing pins when they were the latter kind as they had when they were the former. The witness Polak testified that he told the defendant's general manager that the bushing pins were shearing off "on account of the cream freezing too hard." The defendant's chief engineer testified that there was a device known as an overloading release in connection with ice cream freezers, which, in the case of an overload, would cause the motor to stop; that this was a method provided to protect the machine in case the ice cream was frozen too hard. He testified that there was no such device on the Thompson freezers, but that the method of protecting those freezers, was the use of a fuse, which would blow out and cause the motor to stop, if

the machine was overloaded because of the hardness of the cream. On cross-examination this witness testified that he had never seen an ice cream freezer with the overloading release on it. On redirect examination he testified that the blowing out of the fuse produced the same effect as the mechanical overloading release. The witness Ballard, who has been referred to, testified that there was a rheostat on the Thompson machine, which had a release on it, and in case of an overload it would throw out and stop the machine; that there was one on each motor but they didn't always work.

The gaskets were made of rubber. They were on the inside of the cylinder heads, which were held onto the cylinder by means of tie-rods. These cylinder rods and gaskets could be tightened up by turning down the bolts on the tie-rods. It was the position of the plaintiff, supported by the testimony of the witness Polak, and other witnesses, that the gaskets were softened by reason of the defendant using boiling hot water and live steam, in cleaning out the cylinders. It is not difficult to appreciate the necessity of comparatively frequent renewal of rubber parts on machinery of the type involved here. The evidence shows that the cylinders were made of German silver and the cylinder heads were nickle plated on the outside and silver nickled on the inside. In the fall of 1931, the plaintiff began to complain of the nickle plating peeling off, apparently from the inside of these cylinder heads. There is also some testimony in the record referring to oil leaking into the cylinders from the gear boxes.

In the spring of 1921, the defendant began to experience leaking cylinders. Pin holes appeared along the line where the cylinders had been brazed, resulting in the brine getting into the ice cream. Apparently, the defendant viewed the other troubles they had had up to that time, as minor, but the leaking cylinders were considered a major difficulty. McInnerney, after testifying to broken chains and stripped gears, broken bushing pins and beater rods, said he "considered these difficulties as minor ones" although they "interfered quite a little with my business at that time." In writing the plaintiff company under date of July 30, 1920, he referred to Polak coming out to make some repairs, and said, "I am sure that before this reaches you, you will know all about our troubles and think you will agree that they are not so serious but that they can be easily taken care of, and when they are I am sure we will have one of the best ice cream plants in the country." In a letter written by McInnerney to the plaintiff during the same month, when the defendant's last remittance was sent to the plaintiff, he referred to the fact that thehot weather had taxed the defendant's capacity to the limit, and went on to say, "With the changes that we made after you were here, we have been able to get our production up to about 15,000 gallons per day." But he testified that when the gaskets began to break down and let the brine into the cream, and when the cylinders developed leaks, which occurred for the first time in the spring of 1921, he considered that they were having troubles of a major nature, with the plaintiff's freezers. The defendant's chief engineer testified, on cross-examina-

tion, that with the exception of the leaks in the cylinders the defendant "had the same trouble more or less with the Miller and Creamery Package machines that we had with the Emery Thompson Machines." The freezers which were installed by the defendant to take the place of the Thompson freezers, when they were taken out in 1922, were Miller machines.

The plaintiff company supplied the defendant with ten new cylinders in the spring of 1921. The testimony shows that the leaks in the original cylinders first appeared in the spring of that year. At the time these new cylinders were supplied, the plaintiff wrote the defendant a letter stating that they had "never had one of these machines leak a drop" except in the defendant's plant, and it was the plaintiff's contention at that time and was its contention on the trial, that these leaks in the cylinders were occasioned by the failure of the defendant to follow directions in cleaning out the cylinders. On the other hand, it was the defendant's contention that they used the same method in cleaning the cylinders of the Thompson freezers they had always used on freezers of other manufacture and that these methods had never resulted in any trouble with any of the other freezers. The defendant introduced testimony to the effect that when Polak was at its plant, he stated that these cylinders were brazed outside the plaintiff's plant and were afterward subjected to certain pressure tests, in the plaintiff's plant, and if they developed leaks they were soldered. In his testimony Polak denied making any such statements. Some cylinder parts were produced at the trial of the case, which had some solder upon them. When the witness Polak was on the stand he was shown these parts, and he said that no solder was put

on cylinders before they left New York. It appears from the testimony that a coil ran around the outside of these cylinders and some solder was used to hold the coil to the outside of the cylinder. Polak testified that the solder which appeared on the cylinder parts produced at the trial was put there to hold these coils on the outside of the cylinder. He further testified that solder was never put on to cover defects that might show up as a result of the pressure tests.

It is the plaintiff's contention that the leaks in the cylinders of the freezers, which were complained of by the defendant, were caused by an improper treatment of them by the defendant's employees, in connection with the process of cleaning the cylinders. On the other hand, the defendant contended that their process of cleaning was all right and the same as had been used on other freezers without any bad effects, and that the leaks in the cylinders on the Thompson freezers were due to improper welding. The directions for operating their freezers, sent to the defendant by the plaintiff, contained a paragraph entitled "Cleaning" which read as follows:

> "Cleaning - Never use live steam or scalding hot water to flush out machine. If medium hot water should be used it is advisable not to leave it in the freezer for any length of time. Continuous heat causes the gaskets in the head of the freezer to harden, which may in time leak. In case of Brine leak on interior of cylinder, tighten up cap nuts on 6 tie rods on back of cylinder. In case of oil leak at center bushing, tighten up lock nut in open space between gear box and cylinder plates with slight turn on hole in head of lock nut bushing."

Section 1983 of the Ordinances of the City of Chicago which was introduced in evidence, made it the duty

of the defendant "to cause all cans and other receptacles in which milk or cream is kept, and all cans, receptables and utensils used in the process of making ice cream or other frozen food products, to be thoroughly washed and sterilized in boiling water and live steam each time they are used as soon as they are emptied, and before being used again." The defendant did not interpret this ordinance to mean that they were obliged to wash and sterilize their freezer cylinders at the end of each freezing operation, but the testimony shows that the defendant only washed and sterilized the freezer cylinders once a day, at the end of the day's work except when they changed from one flavoring to another, in using a given freezer; in which case, before putting in the cream with the new flavoring, they washed and sterilized the cylinder.

It would seem to be obvious that in requiring these freezer cylinders to be washed and sterilized, "as soon as they are emptied," the ordinance cannot be said to prohibit the taking of such time as might reasonably be required to bring the temperature up from the low point at which it would be during a freezing operation, to a point sufficiently high to prevent unduly sudden expansion of the metal when the hot water was put into the cylinder. Considerable testimony was introduced in the trial court by both parties, on the question of the proper methods of washing and sterilizing these cylinders. In most respects, the testimony thus presented by the two parties, was not dissimilar. Witnesses testifying on each side stated that the proper method of cleaning the cylinders was to introduce cold water into them

as soon as they had been emptied, and then start the machine and run it for a minute or two so as to separate such particles of cream as remained in the cylinder from the cylinder sides, and wash the surfaces of the cylinder, and then to empty this water out. The testimony was to the effect that there shou d next be introduced some warm water, and after the same process was gone through, as with the first water, this warm water should be emptied out, and, after these two operations, the very hot water should be used so as to accomplish the sterilizing of the cylinders.

It seems that the practice of the defendant was to leave the brine in the chamber between the two cylinders during the washing and sterilizing process. One witness testifying for the defendant, gave it as his opinion that this was the correct process because the short time during which the hot water was in the cylinder could not raise the temperature of the metal very much, in his judgment,- at least not enough to set up any unequal strain, owing to the fact that the water had to raise the temperature of the brine on the outside of the cylinder. The president of the plaintiff company disagreed with the witness just referred to. He testified that he did not know that it was the custom of the defendant to leave the brine on the outside of the cylinders after the cream was taken out and he gave it as his opinion that it would be very detrimental if it did remain. This witness testified that he repeatedly wrote the defendant to the effect that the trouble they were having with leaks in the cylinders was due to improper washing and sterilizing methods, and was

caused by the fact that their employees were applying steam to the cylinders while they were very cold and before time had been given to enable the temperature of the metal in the cylinder to rise to some extent before the extreme heat was applied.

The witnesses who testified as experts, and gave their opinions on the proper method of washing and sterilizing these cylinders and who stated the proper method to be as outlined above, were not asked whether these three washings should follow one another in rapid succession or whether any time should be permitted to elapse between the washings, and if so, how much. The testimony shows that the custom followed by the defendant, in washing and sterilizing these cylinders, was to run the machine after the introduction of the first water, which was cold, "for maybe a minute or half a minute," and then, apparently, to introduce the warmer water into the cylinders at once and again operate the machine for another minute of so, "and then right after that we began the scalding with steam so that hot water or steam was put in the freezer within two or four minutes." Another witness testified as to the practice pursued by the defendant as to the washing and sterilizing of the cylinders. That testimony given the impression that these three operations followed one another in rapid succession. It should also be noted that these cylinders were in use in the busy season for practically twenty-four hours a day. The witness last referred to testified that "We were obliged to operate both days and nights in order to keep pace with our production, with the Emery Thompson machines and the 7 Creamery Package

Machines." If after some hours of repeated freezing operations, with brine at a low temperature continually circulating about the outside of the cylinder, this metal was subjected to a temperature of boiling water or live steam within the short space of from three to four minutes, it would seem inevitable that trouble would eventually appear along the line of brazing. The witness Ballard, who, as already pointed out, was a mechanical engineer of thirty years experience who had specialized in refrigeration throughout that time, testified that his experience in handling metals showed that "contraction and expansion will break anything, and * * * that was the cause of those leaks." This witness further testified that he had observed the washing and sterilizing process used by the defendant's employees and that first they introduced tepid water and threw that out, "and about three minutes later they put hot water in. In my opinion they should have put in water not quite so hot at the first, and they should have waited probably 10 minutes before applying boiling hot water, instead of five or six minutes." This witness testified that he had been in a number of plants similar to the one operated by the defendant, and observed their practice in washing and sterilizing their cylinders, and that they used first, cold water and then tepid water and then finished up with hot water, and that the process consumed from 15 to 20 minutes. This witness then testified that he had observed that the defendant's employees in washing and sterilizing the Thompson freezers, first used a tepid water and "right after that the hot water came in without allowing any time to elapse, just as quick as they could throw it in."

The evidence shows that as soon as the first deliveries went forward from the plaintiff on the first order involving the ten freezers, bills were sent to the defendant by the plaintiff for the purchase price of the freezers, all these bills reading, "Terms, Net 30 Days" and the evidence further shows that on a number of occasions throughout the period involved, the plaintiff wrote the defendant urging payment. On no occasion did the defendant take the position that it was delaying payment, either because it understood that the freezers were the plaintiff's until they gave the defendant absolute satisfaction, which was the position of the defendant when this case was tried, nor did the defendant ever give as a reason for its delay in payment, either the contention that the machines were not as warranted or that the defendant was experiencing difficulties with the freezers. On the contrary, in spite of the fact that from the time the defendant began the operation of these freezers in the spring of 1930, until late in that year, it experienced the break downs , which it now alleges to be due to such defects in the freezers as amounted to a breach of warranty, the defendant, on December 2, replying to a letter from the plaintiff, dated November 27, wrote it would send the plaintiff a check for $5,000 on the 5th, and that was done. Nothing was said about alleged defects in the freezers, nor was any contention made that they were not as warranted, or that they were not satisfactory and that the agreement between the parties was that they were to remain the property of the plaintiff until they were satisfactory. Again in June, 1931, six months later, after the difficul-

ties had appeared which the defendant describes as major difficulties, and after the second lot of freezers had been installed, and put into use, the defendant wrote the plaintiff a letter dated the 14th of that month. Apparently the plaintiff had shortly before that written a letter contending that the leaks in the cylinders were due to improper treatment in washing them, and in this letter of June 14, the defendant assured the plaintiff that they were unusually careful in handling the cylinders, and that it was up to the plaintiff "to prove or disprove that the care in the manufacture of the machine and the inspection you give it, are not good." The writer of this letter then proceeded to give the president of the plaintiff company some friendly advice and urged him to go into the matter personally and satisfy himself "that where carelessness and indifference exists there is always going to be trouble." This letter then proceeds, "I am enclosing a check for $3500 and from now on from time to time, am going to send you money so I hope before long we will have you paid up. I realize that you have been very generous in the credit you have given us and I want you to know that I appreciate it."

When the president of the defendant company wrote that letter to the plaintiff, it cannot be considered that he had the slightest idea that the freezers he was paying for and which he hoped would soon be entirely paid for, were not his but were the plaintiff's, under an arrangement whereby they were to remain such until entirely satisfactory to the defendant, and that the difficulties the defendant had been having, were such that they were not satisfactory. The fact

that Thompson and McInnerney were old acquaintances and that years before they had been associated in business together for some time, and that, as the letter last referred to expressed it, McInnerney's interest in Thompson could not be greater "than if you were my own boy" is, in our opinion, not such a circumstance as makes it possible to escape from the conviction just expressed. During the following month the defendant again remitted $2500, and again we find no suggestion consistent with the contentions now being made by the defendant. On the contrary, in the defendant's letter of July 8, in which this last remittance was forwarded, the defendant states that the excessive heat of the past three weeks had taxed their capacity to the limit, and that with the changes the defendant had made after a visit of the plaintiff's president, thedefendant had been able to get its production up to 15,000 gallons per day. The next month, August, 1921, the plaintiff sent the defendant a statement showing the various items going to make up the charges and credits in the account and the balance due. The defendant acknowledged receipt of that statement under date of August 27, 1921, and in reply to a notation on the statement, asking the defendant whether it agreed with the defendant's records, the defendant wrote, "You are advised that while the charges are correct there is a difference of $3,204.15 in the credits." The defendant then gave the items making up these credits and concluded, "This leaves a balance of $16,182.86." Here we find the defendant as late as the end of the summer of 1921, nearly at the close of

the peak period of business for that year, stating to the plaintiff that all the charges in its statement, which are the charges involved in this case, are correct, and that the balance due to the plaintiff from the defendant, is $16,182.86.

After such admissions as these, the defendant may not be heard to say. four months later, (when the plaintiff has finally taken the position that it would furnish the defendant with no further parts unless its bill is paid), that the freezers were the plaintiff's because they had not given satisfaction and because they were defective, and explain its inconsistency by saying that the defendant's president was an old friend of the president of the plaintiff company. It was doubtless due to this same friendship that the plaintiff allowed this account to run so long without taking vigorous action to accomplish its payment. This fact was expressed in a letter from the plaintiff to the defendant, written under date of November 18, 1921.

In explanation of the fact that the plaintiff was given the order for the second lot of freezers in the fall of 1920, in spite of the troubles which the defendant alleges it had begun to experience with the first lot, immediately after the initial installation in May, 1920, the defendant represents that Thompson came to the defendant's president, and stated that he had found out that there was a lot of criticism of his machines going about and he wanted to counteract it, and asked McInnerney to help him accomplish that by giving this second order, explaining that this would have the desired

effect because the criticism was based on remarks that had spread about, to the effect that the defendant company was having a lot of trouble with the Thompson freezers they had installed the previous spring. Thompson denied this in his testimony and testified that this second order came from McInnerney unsolicited. Thompson admitted, in this connection, that at the time this order was given him McInnerney complained with reference to the operation of the first machines, saying that they had had trouble with the chains and the gears, and that some of the gaskets were leaking. Thompson testified that at that conversation he told McInnerney he would take the matter of the chains up with the manufacturer. We have previously noted the result of that investigation, and we have also referred to the other defects in the machines.

Under date of September 30, 1920, the defendant wrote a letter to the General Necessities Corporation at Detroit, Michigan, which letter was written at the solicitation of the plaintiff. It read as follows:

> "We have had in operation for a period of four months, ten 130 gallon Emery Thompson Freezers. These freezers have given us very good satisfaction as is evidenced by the fact that we expect to place five more in the Central Plant this year.
> There are not any bad points about them that we have been able to discover. Any slight defects that we might have had at the start were caused by lack of familiarity with these machines on the part of our operators. Since they have become familiar with them they prefer them to any of the former machines, that we have had."

The defendant's general manager explains this letter by saying that Thompson visited the defendant's plant shortly before this and the witness told him about some of the break-

downs they had been having, and that, among other things, he told him about the breaking of the chains, and that Thompson said in reply "they had further difficulties with chains and had now started to purchase other chains that would serve the purpose better." This witness further testified that at that time Thompson told him he need not worry about the machines; that he would see that they were put in perfect order and that the machines were his (Thompson's) until they "were satisfied." The defendant's general manager then continued his testimony to the effect that Thompson "also stated that he expected we would receive inquiries from possibly two different sources in regard to our situation with the Emery Thompson machines, one of which would concern a large order. He asked me to give the Emery Thompson machines a good send off." He then testified that he told Thompson he didn't see how he could do that and that Thompson again assured him that he would make good his guarantee and put the machines in perfect condition, and that they were his until he did so, and that Thompson guaranteed there would be "no comeback because those machines will be made one hundred per cent right." The witness then testified that a short time later he received a letter of inquiry from the General Necessities Corporation, and that in reply he sent the letter quoted above.

In the first place, if, in September, 1920, the situation was as described by the defendant's general manager, and if the defendant had been experiencing all the difficulties with these machines which that witness described, and which were considered by him to be such defects as would be

"likely to embarrass me considerably," as he put it, if he said a good word for the Thompson machines, "under present conditions" and nevertheless, this witness, in view of Thompson's assurances, was willing to give Thompson's machines "a good send-off," it was not at all necessary for him to go as far as he did in the letter of September 20. That the situation really was as described by this witness in his letter to the General Necessities Corporation, rather than as described by him in his testimony, is further shown by the fact that this very same witness, only five days before he wrote this letter to the General Necessities Corporation, wrote a letter to the plaintiff admitting, in effect, that the trouble they had been having with the chains was their own fault, and that apparently their former engineer had the idea that these chains needed no lubrication, and that the writer did not know where he got the idea from; and he further intimated that it was a device by which the engineer had attempted to save himself some work, but they could not ask him about it because he was no longer with them. It is not possible to give the testimony of this witness very much weight, when we find him writing that letter to the plaintiff on September 15, and five days later the one to the General Necessities Corporation, at Detroit, and attempting to justify this letter by saying that he did it at the request of Thompson, who assured him that it could never cause him any embarrassment because the defects which the defendant had been experiencing would be made good, and in that connection, Thompson had assured

him that they had been having difficulties with the chains elsewhere "and had now started to purchase other chains that would serve the purpose better."

There were still other things done by the defendant in this case which would seem to be entirely inconsistent with the position which they now take. Under date of June 18, 1921, which was over a year after they first installed the Thompson Freezers and several months after they had accepted and installed the second lot purchased from the plaintiff, and after they had experienced not only those defects admitted now to be of a minor nature, but also those which were considered major defects, such as the leaks in the cylinders which developed in February or March, 1921, the defendant wrote the plaintiff a letter explaining that the City of Chicago was planning a big exposition for that summer, known as the "Pageant of Progress;" that it was expected that this would be "next to the World's Fair in importance as a business inducer" and that the defendant had purchased $1500.00 worth of space for their display. The defendant went on to explain that the other manufacturers of ice cream in Chicago had purchased a large space between them "and will evidently make an effort to have the best display possible of equipment" and so on. The defendant closed this letter by saying, "We thought that it might be to your advantage to display one of your large freezers in our booth during this exposition and if it appeals to you that it might be to your advantage, kindly advise us and we will be glad to figure it in our scheme." It seems further that during the previous summer, in 1920

the defendant was contemplating an extensive advertising campaign, and under date of August 26, about four months after the defendant had installed the first order of Thompson Freezers, the defendant wrote the plaintiff in this connection, saying among other things, that it was their intention wherever possible to "illustrate with half tones, the interesting and highly perfected machinery that contributes to the exceptional quality of the products we manufacture. And, where this is impossible, we propose to include in the reading part of the advertisement, suitable reference to, the various machines and the Companies that make them." Defendant then went on to suggest that this advertising campaign ought to prove of benefit, not only to the defendant but also to the plaintiff. And, in this connection, the defendant through its president, who wrote the letter, said, "It seems evident that it would be extremely valuable to you to be able to send to the entire trade, reprints of the page in which your equipment is to be described and illustrated. How convincing it would be to show prospective purchasers of your machinery such an indorsement. It should be a clinching argument that the Hydrox Company, the largest concern of its kind in the West, thought so highly of your equipment that they not only bought it, but spent thousands of dollars advertising the fact to the public." This letter closed with the suggestion that the plaintiff join with the defendant in meeting the cost of this advertising campaign. The plaintiff replied to the effect that it did not feel it could do so, as they had already charged off $950.00 to advertising, on the defendant's purchase on each machine, that being the difference between the list price of $2750.00 and the

price to the defendant $1800.00, the total difference being $9,550.00; and the plaintiff expressed the hope that the defendant would see that the plaintiff had, "in advance, most generously contributed to your advertising plan." Apparently the defendant went ahead with the advertising campaign outlined in this letter, for we find in the record a copy of its advertisement appearing in one of the Chicago daily papers, under date of October 12. In this advertisement the defendant refers to the "Carbonated Method" of making its ice cream which the advertisement explained is accomplished by "a tiny device" which is referred to, after which the advertisement proceeds as follows:

> "Our freezers are the only ones in all Chicago equipped with this wonder working device and the freezers in themselves are worth telling about -- although there isn't room here to show the big roomful of them. Some make ten gallons of ice cream in fifteen minutes -- some of them THIRTY gallons. These great giant freezers are made for us by the celebrated Emery Thompson Company of New York. And when they get to going good, on a busy day! Oh! Boy!"

The record discloses that nothing was ever said by the defendant about non-acceptance or about returning the freezers, until the plaintiff made it known that it had waited as long as it was going to for the payment of its account, and that it would refuse to fill any further orders for parts until the account was paid, and furthermore, that any further orders for parts would have to be paid for in advance.

When the plaintiff took this position, the defendant then, for the first time, mentioned the return of the

machines, on the ground that they were not as guaranteed. Thompson testified (and this is not denied) that when he told McInnerney on the occasion of this last conference, that if the defendant did not pay its account the plaintiff would have to turn it over to their lawyers for collection, McInnerney replied, "Well, that won't do you much good because it will be a jury trial, then that can be appealed and by the time you get your money it will take you a long time to get your money anyhow."

The defendant states in its brief that its contention is that the freezers were so defective for the purpose for which they were purchased and for which they were guaranteed that they were worthless and had to be abandoned. We have stated the reasons why we are of the opinion that the record does not bear out that contention, and we have also referred to the reasons why we are further of the opinion that it may not be said that the findings of fact by the trial court, to the effect that the freezers operated in a reasonably satisfactory manner and were reasonably fit for the purpose of freezing ice cream, may not be said to be against the manifest weight of the evidence, as we find it in the record. Apparently the trial court concluded that some of the alleged defects, which the defendant contended amounted to a breach of the plaintiff's warranty, were due to the ordinary wear and tear, and that such as could not be considered in that class, were occasioned by the conditions under which the defendant operated these freezers. We appreciate the fact that much of the evidence in conflicting. Not only is this

the case as to the respective presidents of these two companies, but as to other witnesses. We have appreciated the ability with which the issues involved in this case have been presented by counsel for the respective parties, and the earnestness with which they have urged their viewpoints.

For the reasons we have given, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. and TAYLOR, J. CONCUR.

135 - 20214

WILLIAM E. McREYNOLDS and FREDERICK C. HUNTER,

Appellees,

v.

HENRY HEINSHAUSEN, ET AL On appeal of HENRY HEINSHAUSEN AND MARY S. W. HEINSHAUSEN,

Appellants.

23 I.A. 649

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

In 1914, the defendant, Henry Heinshausen, was in business under the name and style of The German-American Oil Co., dealing in vegetable oils, and apparently acting as agent for German manufacturers, and handling their product in this country. During this time he was a resident of the City of Chicago. In the year above mentioned, an attachment suit was brought in the courts of New York, against Heinshausen, which the record shows was based on transactions involving his dealings as The German-American Oil Co.; and in connection with that litigation, which covered a period from 1914 to 1919, he was represented by the complainants, McReynolds and Hunter, lawyers of New York City. They were obliged to bring suit against Heinshausen in Cook County, Illinois, to recover the amount due them for attorneys' fees, and in such suit they recovered judgment on December 11, 1920, for the sum of $1049.04, and costs. In February, 1922, they instituted the proceeding at bar, which was in the form of a crediters bill, in which they alleged the recovery of their judgment

against Meinshausen for the indebtedness incurred by him during the years above referred to. They proceed further to allege in their bill of complaint that in January, 1921, a writ of fieri facias was issued, which was later returned "no property found and no part satisfied; "that prior to the recovery of their judgment Meinshausen had been engaged for some years in importing vegetable oils; that divers persons became indebted to him and he had personal property belonging to him which ought to be applied to the payment of the judgment; that he was the owner or beneficially interested in certain real estate and also in certain corporate stocks, and that he was possessed of a bank account with a balance to his credit. The complainants allege further that while their claim was pending and undisposed of, Meinshausen entered into a contract with one Mickinson, wherein he undertook to buy Lot 2, in Woodruff's Addition to Wilmette, Illinois, and thereafter he completed the purchase, but caused title to said lot to be conveyed to his wife, the defendant Mary S. W. Meinshausen, for the purpose of defrauding and defeating complainants' claim and the collection of any judgment that might thereafter be obtained against him, and it is alleged that the consideration and purchase price of this property was paid by Henry Meinshausen. Similar allegations were made as to the purchase of Lot 1, in the same addition by the defendant Meinshausen which purchase was alleged to have been made after the complainants had recovered their judgment at law, and it was alleged that the transfer of this real estate was, as in the case of Lot 2, without actual consideration by Mary S. W. Meinshausen, although the title

was conveyed to her, and that the transfer was colorable only, and that Meinshausen had caused the transfer to be made to his wife solely for the purpose of placing the property beyond the reach of his creditors. It was further alleged that if either of these lots had subsequently been sold, such sale was also merely colorable, and made with the view of placing it beyond the reach of the complainants. The bill contained the usual prayerfor relief. The two defendants filed separate answers, each of which admitted the recovery of the judgment against the defendant, Meinshausen, and denied all the other material allegations of the bill. The issues thus formed were heard by the chancellor in open court. After hearing the evidence a decree was entered in favor of the complainants, in which findings of fact were included, substantially following the allegations of the bill of complaint, and it was decreed that the defendants pay the complainants the amount due them on their judgment, $1250.79, within ten days, with interest from the date of the decree to the date of payment; that in default thereof, the Chicago Title & Trust Co. as receiver and special commissioner, take over all the assets real and personal of the defendant Henry Meinshausen, including moneys on deposit in bank in the name of either of the two defendants, or in the name of the International Export and Trading Co., or of The German-American Oil Co., and that the receiver also take over the two lots, the deeds of conveyance to which were declared null and void as against the complainants, and title in which was declared to be in equity in the said Henry Meinshausen. In the event the defendants failed to pay the judgment as decreed, and the receiver took over the property, it was directed

to pay out of such assets, the cost of this suit, the amount due the complainants, and to pay the residue to the defendants. To reverse this decree the defendants have perfected this appeal.

In support of this appeal the defendants contend that the decree is erroneous because it is neither alleged by the bill, nor established by the proof, that Meinshausen was insolvent. In our opinion this contention is not tenable. Where a bill charges that defendants have committed acts which amount to fraud in fact, such as shifting bank accounts or transferring title to real estate, with the sole object of preventing creditors from accomplishing the payment of their accounts, it is not necessary to either allege or prove insolvency. Keller v. Whitledge, 38 Ill. App. 310; Wisconsin Granite Co. v. Garrity, 144 Ill. 77; Ebers v. Bieckenberg, 213 Ill. App. 454; McKay v. McGeid, 288 Ill. 566.

The defendants contend further that the chancellor erred in connection with certain rulings on the evidence. The defendant, Mary S. W. Meinshausen, was called as a witness by the complainants and certain questions put to her on the stand, by her own lawyer, were objected to and these objections were sustained. The defendants are not in a position to complain of these rulings, for two reasons. One is that they refer to subjects which had not been included in the direct examination, and the other is that the substance of this testimony was put in later anyhow, when this same witness was called to the stand in her own behalf. The latter reason is not affected by the fact that still later

in the trial, all the testimony of this witness was stricken out. The action of the chancellor in striking out this testimony is also assigned as error. It appears that while this defendant was testifying in her own behalf, having completed her examination in chief, and while she was undergoing cross-examination, the trial was suspended for a few moments, and while the chancellor was in chambers, the witness experienced something in the nature of a fainting spell, and when the trial was resumed a few moments later, it was claimed that she was not in such physical condition that she could proceed. This incident occurred on Friday afternoon, September 28, 1923, the hearing having begun on September 25. Mrs. Meinshausen gave no further testimony that day, and at the suggestion of the chancellor other witnesses for the defense were heard and the hearing went over to the following Tuesday, October 2. Apparently there was some thought in the mind of counselfor the complainants that Mrs. Meinshausen would not return to court on Tuesday, and he therefore went out to her home in Wilmette to serve her with a subpoena, and and he was met to at the door by Henry Meinshausen who refused to admit him, with the statement that his wife was not able to see anyone. Thereupon, counsel placed the subpoena in the hands of the sheriff, who went out and served it. However, Mrs. Meinshausen failed to appear on Tuesday, when her counsel produced an affidavit of a physician, in which he stated that he had known Mrs. Meinshausen for more than 30 years, during which time he had been her physician, and that she was physically unable to attend court. The affidavit proceeded to state that "her nervous system had been upset by continuous worry and care during the illness of her husband" during the past seven years.

It further set forth that she had recently recovered from an attack of pneumonia, which, added to her nervous condition and worry about her husband's condition, in connection with a recent operation through which he had passed, had completely upset her so that he had advised her to take a long rest in a sanitarium. Apparently the chancellor was not satisfied with the showing made, and intimated that if the witness did not return for the completing of her examination her testimony would be stricken out. The hearing again went over to the following day, Wednesday, October 3, and again Mrs. Meinshausen failed to appear. The evidence was concluded on that afternoon and the hearing went over to Thursday, and still Mrs. Meinshausen did not appear. The final arguments were then presented and in connection with the announcement of the decision at the close of the case, the chancellor struck out the testimony submitted by Mrs. Meinshausen.

A careful examination of all the facts connected with this incident, as they appear in the record, has led us to the conclusion that in striking out the testimony of this party defendant, the chancellor was justified. No sufficient showing was made by the affidavit of the physician for her failure to appear. Nothing was said in that affidavit as to any new condition that had arisen in connection with the health of Mrs. Meinshausen, since her last appearance in court. All the matters set forth in the affidavit related to facts which were in existence at the time she was in court and testified, and no reason was given why, these facts not having interfered with her presence in court and her taking the stand on Friday of one week, they should appear to the opposite

effect on Tuesday of the next week. A reading of the record makes it quite impossible to escape the conviction that the only reason she refused to return was that her husband did not want her to testify any further. In connection with his argument on this question, counsel for the defendants urges that Mrs. Meinshausen's testimony "should stand and be considered for what it is worth." Even if this is done, and her testimony is considered for what it is worth, we are confident the chancellor could not reasonably have reached a different conclusion.

The defendants contend further that the chancellor erred in admitting in evidence a number of letters written by Meinshausen to the complainants, which letters were offered by the latter in rebuttal. The contention is that these were admissible, if at all, as a part of the complainants' case in chief. We do not think so. The defendant Meinshausen in the course of the defense of this case, took the position that the litigation in which the complainants had represented him, affected him personally and had nothing to do with The German-American Oil Co., and the latter Company having come to be owned entirely by Mrs. Meinshausen, any assets that Company might be shown to have, or any property of Mrs. Meinshausen, should not be subjected to the payment of complainants' judgment. The letters were proper evidence in rebuttal, as tending to show clearly that the New York litigation had to do with Meinshausen, doing business as The German-American Oil Co. One or two other complaints were made about the testimony, which need not be noted here. In our opinion, there was no error committed in this regard.

The defendants further contend that the decree of the court is manifestly improper, for if the deeds to the real estate involved were set aside as directed by the decree, the title would then revert to the parties from whom the property was acquired. This is of course not correct. The decree merely finds that the equitable title to this property is in the defendant Henry Meinshausen, and in effect, that his wife is holding the legal title in trust for him, and the conveyances to her are found fraudulent and set aside "as to the complainants" and in case the defendants fail to pay the complainants the amount of their judgment the decree provides that the defendants are to assign and convey all their interests in these lots to the receiver, the latter being directed to use this property, with any other property acquired from the defendants, for the purpose ofpaying the complainants' claim.

The principal contention advanced by the defendants in support of their appeal is that the decree of the chancellor in this case, is against the manifest weight of the evidence. On this point the defendants first urge that there is no evidence to show that Henry Meinshausen was insolvent. We have heretofore disposed of that question. It is next urged that the money which went into the real estate, as well as the money in certain bank accounts which were transferred to Mrs. Meinshausen, was all her property, and that the deed conveying the real estate to her and the transfers of the bank accounts, were not fraudulent.

The defendant Meinshausen and his wife testified

that he was the owner of the German-American Oil Co., up to January 1, 1914, when he sold it or transferred it to his wife. The reason given for this sale or transfer was that he or The German-American Oil Co. owed Mrs. Meinshausen five or six thousand dollars, which he said she had advanced to him for the business; that he contemplated a trip to Europe in 1914, and wanted to pay up this indebtedness to his wife, so he turned The German-American Oil Co. over to her and she cancelled the indebtedness. The bank account of The German-American Oil Co., was kept at the Northern Trust Company. The chief clerk of the banking department of that bank testified that the account was opened in 1913, and that there had been practically no transactions in it since 1915. This witness produced a document signed by Meinshausen, under date of February 5, 1914, in which he appointed Mrs. Meinshausen as his attorney in fact, and gave her full authority to draw checks for him and "in the name of The German-American Oil Co., of which I am sole owner." Meinshausen testified that the date of his transfer of the Oil Company to his wife, was December 31, 1913. It will be noted that it was over a month later that he gave his statement to the bank in which he described himself as the sole owner of the Company. Not until January 1921, did he furnish the bank with any different information. At that time he gave the bank another statement in writing, on a letter head of The German-American Oil Co., which also contained his name as "manager," and giving as the address of the Company, his residence and that his wife, and in this statement, which sets forth that it is given in response to the bank's request for facts as to the ownership of The German-American Oil Co., Meinshausen

states that its funds "are the property of Mary Meinshausen *** Mr. H. Meinshausen was appointed manager of the business with full power to sign checks, transact banking business and such other business as the business of the German-American Oil Company required." Although the witness from the bank testified that they got this statement from Meinshausen in connection with the Oil Company's account, it was signed, "German-American Oil Company, Mary Meinshausen." In the left hand margin appeared the words, "German-American Oil Company, Manager, Henry Meinshausen." Meinshausen testified that he agreed to postpone his European trip until the summer of 1914, at his wife's request, when he was prevented from leaving this country by reason of the war.

There was another account used by these defendants, which was in the name of the International Export and Trading Co. This also was not a corporation. It was started in 1920. Meinshausen testified that his wife was the owner, and he was the manager of it. The account in the name of this Company was opened in the Continental & Commercial National Bank on January 4, 1921, with a deposit of $1,000. Meinshausen testified that this was the proceeds of the payment of a bond which had been deposited in the Northern Trust Company,- also that this Company had not transacted any business "to any material extent," because of unfavorable European exchange. He further testified that the account mentioned, as well as the account of The German-American Oil Co., were accounts belonging to his wife and moneys were deposited representing interest coupons, mortgage payments, and bond sales, which belonged to her and that none of them belonged to him. He testified that he

received the appointment as manager of the Oil Company from his wife at the time he turned that Company over to her and "she returned the notes which I owed her." The assistant auditor of the Continental & Commercial Bank testified that he had made an examination with reference to the account of the International Export and Trading Co., "of which Henry Meinshausen was manager;" that the account was opened January 4, 1921, and that the authority for signing checks was executed by Mary Meinshausen. He further testified that the average balance of this account since it had been opened, was in the neighborhood of $2000 to $3000.

When Mrs. Meinshausen was on the stand as a witness for the complainants, she was asked whether she had any papers or bank deposits at the Continental & Commercial Bank, and she answered, "Ask Mr. Meinshausen. He knows all about it." She was then asked if she did not know about it and she answered, "Well, that's his business. He acted as my agent and he ought to know." A number of questions were asked her about the International Export and Trading Co., and the account at the Continental & Commercial Bank, to all of which she pleaded ignorance, saying, "You better ask Mr. Meinshausen about it. He ought to know everything because he is my agent, and all kinds of business, I don't understand." She was asked where the money came from that went into that account and she said she could not answer. The bank book was in court and showed a number of pages of deposits and upon being asked about these, she replied, "Why, ask Mr. Meinshausen. He knows all the business." The attention of this witness was then directed to the fact that there was some money in the account of the German-American

Oil Co. at the Northern Trust Company and that she was the agent authorized to withdraw it, and she was asked what had become of that money, and she answered, "You have to ask Mr. Meinshausen because he was the manager * * * and he ought to know."

It will be noted that the purported transfer of the Oil Company from Meinshausen to his wife took place at the time he was having a controversy with a man in New York, which resulted in the attachment proceedings which were brought against him there, and this transfer was made shortly before the proceedings were instituted, and further, that the first time the International Export and Trading Co. appears, is in January 1921, less than a month after complainants secured their judgment against Meinshausen in the action brought against him to recover their fees.

Mrs. Meinshausen opened a savings account in the Northern Trust in 1919, and it was still open at the time of the trial of this case, but its balances had always been nominal, averaging under $200. Mr. Meinshausen had a checking account at the same bank, which was opened in 1912. This account had also been a small account. At the time of this trial the balance in that account was $8.04.

Testimony was given by Mrs. Meinshausen to the effect that both Lots 1 and 2, in Woodruff's Addition to Wilmette, were purchased with her money, the transactions being handled by her husband as her agent; that the money which was paid for Lot 2 came from the sale of property in the City of Chicago, at which she and her husband had formerly

resided. It appears from the evidence that Mrs. Meinshausen's mother lived with them from about the time they were married until she died, and Mrs. Meinshausen testified that her mother gave her money from time to time, totalling about $18,000; that their former home in Chicago was first purchased by her husband, and in 1903 was sold to her mother, and in 1910 was conveyed by the latter to Mr. Meinshausen, and a year later was conveyed by him to his wife, and when it was sold in 1920, the proceeds of that sale went into the purchase of Lot 2 in Woodruff's Addition. In the course of the examination of Mr. Meinshausen, the checks that were given in payment of Lot 2, by him, were put in evidence. They were all checks of the German-American Oil Co., dated in 1920, and signed "German-American Oil Co., H. Meinshausen." The first one for $1,000, contains an endorsement reading, "For a/c Henry Meinshausen. First payment earnest money on $11,500. purchase price for bungalow. Wilmette, Illinois." The remaining checks all contain an endorsement reading, "For account Mary S. W. Meinshausen * * *" Checks given in payment of Lot 1 were also introduced in evidence, signed "The International Export and Trading Co. H. Meinshausen, Manager," and containing the endorsement reading, "For account Mary S. W. Meinshausen." Meinshausen testified that he was the superintendent of the building and construction work that was done on Lot 1; that he made payments to meet the payroll of the contractor every saturday, from his wife's funds, but not from any funds that he owned. With reference to the property in which these parties formerly lived in Chicago, Meinshausen testified that his wife bought the property from him in 1911.

The record contains testimony concerning the purchase of mortgages and bonds to a considerable amount, and it is shown that all of these purchases and sales of securities were made by Meinshausen, but the defendants testified that it was all Mrs. Meinshausen's money and not his. A witness connected with one of the brokerage houses, through which these purchases were made, testified that orders to purchase these securities was placed by Meinshausen in the name of the German-American Oil Co., and that he purchased securities of them in that manner to the extent of $13,000, in December 1920,- (a few days after the complainants secured their judgment against him in the suit at law.) A number of checks drawn to the order of this brokerage firm were introduced in evidence, all signed, "German-American Oil Co. H. Meinshausen." This witness further testified that the account with this brokerage house was opened in the name of the Meinshausens and that when, in closing the first transaction, it appeared that he was paying for the securities with the funds of the German-American Oil Co., they asked him about it and he replied, "I am the German-American Oil Co." All of his transactions with this brokerage firm occurred in 1920, six years after he claims he sold the company to his wife and thereafter had no interest in it except in acting as her agent.

Meinshausen testified that none of his expenses were paid out from these various bank accounts appearing in the names of the companies that belonged to his wife. The record shows that Meinshausen had lost a limb, and in this connection had been obliged to procure an artificial one. A

salesman connected with the company from which this limb was purchased, testified and produced a communication dated September 7, 1923, on a letter head of the German-American Oil Co., addressed to the firm referred to, reading, "Please construct for our Mr. Meinshausen, Gen. Mgr. of our Company, one artificial limb," etc., this communication being signed, "International Export and Trading Co., H. Meinshausen, Manager." The witness testified that he did not attend to receiving payment for this artificial limb and did not know who paid for it. On cross-examination, Meinshausen admitted that the International Export and Trading Co. paid for it.

The real estate broker who negotiated the sale of Lot 3, testified that the commission on this sale was paid by a check signed by Meinshausen. This witness testified that Meinshausen talked with him about Lot 1, and said it was his and he wanted to sell it. A witness connected with the Hines Lumber Company testified to furnishing the lumber for the building that went up on Lot 1, which he said was paid for by checks signed by Meinshausen. The building contractor who put up the building on Lot 1, said he had all of his dealings with Mr. Meinshausen; that he received checks every week from him to meet the payroll, but never received any from Mrs. Meinshausen. He further testified that Meinshausen told him it was his money. The contract for this building was signed "Mary S.W. Meinshausen by Henry Meinshausen her authorized agent." The man who sold the defendants Lot 2, testified that the contract

for the purchase of the property was signed by Meinshausen, and that he wasthe one that paid all that was paid under the contract, the checks being signed by him, as his personal checks. He testified that he talked with Mrs. Meinshausen about some details of the finishing of the house on the property and she referred him to Mr. Meinshausen, saying, "I have nothing to say about anything that goes on around here. I have nothing to say about this property." When the property was conveyed, the deed was made out by Meinshausen and delivered to the witness for executi n, and he testified that he noticed it was made out to Mrs. Meinshausen, as the grantee.

The Meinshausens were married in 1893. She testified that since that time she had lived at home with her husband and had not received any money in the way of earnings, of any kind. She testified that her mother, had given her considerable money; that her mother's estate had never been probated; that for the most part, she did not keep her money in the bank but in the house; that her mother gave her different amounts, from time to time,- "When I needed money she gave it to me * * * At different times she gave me $1,000, $500, and so on. She all the time gave me money. During her life I had about $12,000 from her * * * She gave me money all the time when I needed it. That's all * * * I don't know where she kept it." Mrs. Meinshausen further testified that she had saved approximately $1,000 a year out of the money her husband had given her since the time they were married in 1893; that prior to the time he went into the

vegetable oil business he was a traveling salesman for different concerns; that as she saved up her money she "kept it in the Northern Trust Company in my name and in Mr. Meinshausen's name," and when she had enough "we bought bonds with it * * * Mr. Meinshausen bought them for me. I let him handle the whole business."

Meinshausen testified that ever since he and his wife were married he had handled all financial matters of here which required attention; that as her investments matured, he collected them and reinvested the money; that all the money put into these bonds and other investments belonged to his wife, and that the same was true of the money that had been used to purchase Lots 1 and 3. He further testified that he gave his wife over $15,000 during the period from 1910 to 1913. Mrs. Meinshausen's mother died in 1918, and he testified that his wife had received approximately $19,500 from her mother during the years prior to that time. On cross-examination he testified that he had no property in 1921; that he had money at the time complainants recovered their judgment, but he didn't know how much.

The entire burden of the testimony given by Mrs. Meinshausen when she was called to the stand for the complainants, as well as later when she testified in her own behalf, was to the effect that as far as their investments were concerned she knew practically nothing about them, but that everything was left to her husband. The effect of much of his testimony was the opposite. He denied that she turned her money or property over to him. Even his own testimony is contradictory

for at other points in the record his testimony is to the effect that he attended to her affairs. At one point he testified that as to all investments and all transactions of the German-American Oil Co., he did not use his own judgment and discretion, but that he and his wife talked matters over.

When he was being pressed, in the course of his cross-examination, as to records of investments made by him for his mother-in-law and for his wife, and in connection with this examination certain letters and other documents were presented to him for his identification, and he was asked whether or not the signatures appearing thereon were his, he announced that he had broken his glasses and that he could not identify his name on any documents shown to him, because everything was blurred,- "I cannot see my signature on any paper or letter this morning." When being cross-examined as to the use of checks purporting to be those of the International Export and Trading Co., in paying his personal expenses, and he was asked what funds had been used in paying certain specific bills that were referred to, he answered that they were paid partly out of funds in his possession "and partly of the funds which were used during -- in fact to be close to the truth about it, I don't know."

From what we have said of the testimony it will be noted that in an effort to account for the fact that she had all the money, Mrs. Heinshausen testified that her husband had given her sufficient funds to enable her to save $1,000 a year ever since 1893, when they were married, and yet she

testifies that her mother gave her an aggregate of $18,000 during this period and, in explanation of this, states that she gave her $500 or $1000 whenever she needed it. Another strange circumstance in the testimony is that Meinshausen testified that the reason he turned the German-American Oil Co. over to his wife on December 31, 1913, was that she had advanced five or six thousand dollars to him for immediate use in his business and he was anxious to wipe out that debt; that the Oil Company owed nobody at that time except this amount to her, and that he therefore turned the company over to her in payment of the debt, and she then gave him back his notes; and yet he testified at another point that, during the three years ending in 1913, he gave his wife over $15,000. In explaining the fact that during this very time he had borrowed five or six thousand dollars from her "for immediate transactions," he says, "She did not get that money from me."

When it was shown that the costs and expenses of the litigation in New York, from the early part of 1914 to 1919 were paid by the checks of the German-American Oil Co., and Meinshausen was contending that the litigation involved him personally, he testified that the money represented by those checks was his money, although this was after the time he claimed he had sold the company to his wife, and therefore had no property interest in it. When checks of this very same kind are shown to have been given in payment for one of the lots in Woodruff's Addition, in 1920, and he was contending that this property belonged to his wife, he testified that the

money represented by these checks was not his money.

Not only would it be impossible for this court to say, as the defendants contend, that the findings of the decree of the chancellor were against the manifest weight of the evidence, but, in our opinion, it would be quite impossible for us to read all this testimony, even including that part of the testimony of Mrs. Meinshausen which the chancellor struck out, and which we have given careful consideration, without coming to the conclusion, as the chancellor did, that the German-American Oil Co., both before and after 1914, was none other than Henry Meinshausen, and that the same was true of the International Export and Trading Co., and that the purported sale of the Oil Company and the creation of the name and account of the International Export and Trading Co., and the transfer of title to the Wilmette lots, had only one purpose, and that was an effort to prevent the collection of the complainants' judgment. Whether there were other pressing claims, the record does not show. As was pointed out by the court in Hauk v. Van Ingen, 196 Ill. 80, where facts and circumstances show a transaction or conveyance to be fraudulent as against creditors, statements of the parties involved, under oath, to the effect that the transactions were not fraudulent or that they were carried out in good faith, can avail but little. Kennard v. Curran, 239 Ill. 132, is to the same effect. Likewise, it matters not that the conveyance attacked in the case at bar were not from a husband to his wife but were from a third party direct to the wife. McKey v. Cochran, 282 Ill. 376; McKey v. McGeid, 298 Ill. 566.

It may well be that Mrs. Meinshausen furnished some part of the capital that at different times went into the property of herself and her husband and the vegetable oil business, and if that was the case, these funds, on the testimony of the defendants themselves, have been conserved and increased by the efforts of Henry Meinshausen, and that being the case, they should not be considered as her separate property and not liable for her husband's debts. Our Supreme Court well said in Wilson v. Loomis, 55 Ill. 352,

> "It is seldom, however, that we find men working exclusively for and carrying on the business of a general trade in the name of the wife, when there are no debts, the payment of which it is desirable to avoid. The rule is, that if the wife advance her own separate money, and place the same in the hands of her husband for the purpose of carrying on any general trade, and the husband, by his labor and skill in that undertaking, increase the funds, the entire capital embarked in the enterprise, together with the increase, will not constitute the separate estate of the wife, but will be liable for the debts of the husband. As between the husband and wife, if the rights of no creditors intervene, the rule might be different. *** The capital originally invested in the trade was increased by the labor of the husband, and then reinvested and so on, until it had increased three or four fold, and the property thus acquired by the labor and energy of the husband must be held liable for his debts."

The foregoing rule has been followed in McKey v. Cochran, supra, Hauk v. Van Ingen, supra; Torrey v. Dickinson, 313 Ill. 36, and Storey & Clark Piano Co. v. Kropsch, 231 Ill. 419.

For the foregoing reasons the decree of the Circuit Court is affirmed..

DECREE AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

128 - 29317.

JOHN S. GARRITY,

Appellee,

v.

JOHN W. FORD, Jr. and C. P. BELLOCK, Doing business as the FORD, BELLOCK & CO., and BERNARD G. BLANCHARD,

Appellants.

237 I.A. 650

APPEAL FROM

COUNTY COURT

COOK COUNTY.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $874.32, recovered against them jointly by the plaintiff Garrity, in the County Court of Cook County.

The defendant Blanchard was the owner of a piece of property in the City of Chicago, upon which he was constructing a dwelling house. In July, 1921, the plaintiff Garrity executed a contract with Blanchard, under the terms of which Garrity undertook to buy the property from Blanchard for $9100.00. Ford, Bellock & Co. were the real estate agents who negotiated this contract, representing the defendant Blanchard. At the time the contract was executed, $500.00 was paid over by Garrity, at the office of Ford, Bellock & Co., as earnest money, and the contract provided that this amount was to be applied on the purchase when consummated. By the terms of the contract, Garrity undertook to pay $3700.00 more within five days after the title had been examined and found good, provided a warranty deed covering

the property was then delivered to him. The balance of the payments were covered by further provisions in the contract. The contract contained a clause to the effect that if the purchaser failed to perform, at the time and in the manner therein specified, the earnest money paid should, at the option of the vendor, be retained by him as liquidated damages. Another clause provided that the contract and the earnest money were to be held by Ford, Bellock & Co., for the mutual benefit of the parties concerned, and this clause provided that in case the earnest money was retained, as provided in the contract, it should be the duty of Ford, Bellock & Co. to apply the same, - first to the payment of any expenses incurred for the vendor and second, to the payment of the broker's commission, the amount of which was not specified. Apparently, Blanchard was in need of funds with which to complete the building which was being erected on the property, and in August, 1921, he requested Garrity to make another payment of $500.00. Garrity went to the office of Ford, Bellock & Co. and made this payment to them, and while he was there, the defendant Blanchard came in and in Garrity's presence the real estate agents turned over the $500.00 payment to Blanchard. An opinion of the Chicago Title & Trust Co., as to the title, was turned over to Garrity by Ford, Bellock & Co. and it is not shown that the plaintiff raised any objections as to the title.

It is Blanchard's contention that the plaintiff was notified late in August that he would be ready to close the deal in September and on that date Garrity called at the office of the real estate agents and he was asked if he was in a position to pay the balance of $2200.00 due under the terms of the contract; that Garrity did not have the money and asked Blanchard to accept a smaller cash payment and give him possession, even

though the building was not then entirely finished, and the plaintiff proposed that he would pay the balance of the $3000.00, called for under the contract, when the building was completed; that he did not know just when he would have the money to pay the balance of the cash called for by the contract, but that it would be sometime within thirty days and that he stated that he was willing to go ahead with the deal if Blanchard would give him possession at once; that Blanchard refused to give Garrity possession unless the full $3000.00 was paid, whereupon the plaintiff demanded the return of his money and notified Blanchard that he would not carry out the contract further. It is the contention of the plaintiff that when he went to the office of the real estate agents on September 2, 1931, the building was still unfinished and the defendants demanded the balance of $2200.00 due on the contract, and the plaintiff then notified the defendants that he would go ahead with the deal if he could get possession; that no abstract of title or deed was tendered him and nothing further took place at that time concerning the closing of the deal; that he told the defendants he did not have the money at that time, but would have it as soon as the building was completed and that he would not give them the balance until the building was completed. The plaintiff was especially anxious to get his family established in the new home, and he alleges that he offered to put up some security that he would carry out the deal, if he got possession, even if the building was unfinished, and that he would then pay the cash balance called for by the contract, when the building was completed, but the defendants refused to give him possession or do anything further in the matter, whereupon he demanded the return of his money. The money not being forthcoming, the plaintiff brought

this action against the defendants, jointly, seeking a judgment for $800.00, being the sum of the two payments he had made, - the first of $300.00 as earnest money, and the second of $500.00, under the circumstances referred to above. The declaration filed by the plaintiff consisted of two counts, that are referred to as special counts. The second was later eliminated. The first was not a special count but was a common count for money had and received. Counsel for plaintiff so referred to it in the course of the trial. Added to this so-called special count, the declaration contains the printed common counts. The defendant Blanchard, filed a plea of affidavit of merits in which he denied that he was indebted to the plaintiff, as alleged in the declaration, either jointly with Ford, Bellock & Co., or severally. The defendants, Ford, Bellock & Co. also filed a plea of the general issue and an affidavit of merits in which they set forth the details as to their connection with the contract between Blanchard and the plaintiff and they alleged that they acted only as brokers representing Blanchard. The issues thus formed were submitted to a jury resulting in,a verdict finding the issues for the plaintiff and assessing his damages at the amount of his claim, with interest. Judgment followed accordingly, to reverse which this appeal has been perfected.

Counsel for the plaintiff repeatedly assert in their brief filed in this court that the action brought by the plaintiff was not based upon the express contract he had with Blanchard but was based upon an implied contract, under which the defendants were obliged to return his money, because that money was equitably and rightfully his and because it ought to be restored to him. In support of this contention, counsel present an argument in which they set forth the execution of

the contract and point out the obligation undertaken by Blanchard, by the terms of the contract, and they contend that Blanchard failed in performing his obligations, and that thereupon the plaintiff, "as he had a right to do under the law, a reasonable time having elapsed, demanded of the defendants *** the return of his money * * * from these three defendants, who the record now shows were everything but faithful to their agreement or responsible to their repeated promises made to the plaintiff." At another point in the brief counsel argue that "more than a reasonable time elapsed and the contract in evidence having been broken by Blanchard, and Blanchard having done nothing to live up to his part of the contract, either to finish the building or to supply the papers required under the contract in evidence, the plaintiff was entitled to demand and receive back the money paid by him."

Assuming that Blanchard committed such a breach of the contract as entitled Garrity to cancel it and declare their relationship to be at an end and recover the money he had paid under the contract, it by no means follows that this action brought by him may be maintained.

In the first place, it is entirely clear that the defendants, Ford, Bellock & Co., had nothing whatever to do with this transaction, except in the capacity of real estate brokers representing Blanchard. The $300.00 in their hands was held by them as brokers, under the terms of the contract, but it constituted a payment to Blanchard under the contract. Under the evidence in this case, it is of course apparent that they could not be held liable for any part of either the $300.00 paid as earnest money or the $500.00, which formed that second payment which the plaintiff made under his contract.

In the second place, if the plaintiff is entitled

to a return of his $800.00 from the defendant Blanchard, it is, as stated by his counsel in their brief, and as pointed out above, solely because of the fact that Blanchard has committed such a breach of the contract between them as entitles the plaintiff to declare the contract at an end, and to demand the return of his money. We do not consider that the question of whether Garrity or Blanchard breached the contract existing between them, is presented for decision on this appeal, and therefore, we do not pass upon it.

For the reasons stated, the judgment of the County Court is reversed and the cause is remanded to that court.

JUDGMENT REVERSED AND CAUSE REMANDED.

O'Connor, P. J. and
Taylor, J. concur.

137 - 28326

ROBERT B. CLARK,

Appellant,

v.

LOUIS DONOVON AND R. B. STALLWORTH,

R. B. STALLWORTH,

Appellee.

237 I.A. 650

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Clark brought this action in attachment against the defendants Stallworth and Donovan. Stallworth was a resident of the State of New York. Donovan lived in Chicago. Donovan was never served with summons but Stallworth entered his appearance. The plaintiff brought his action to recover $500.00, which he claimed was due him from the defendants for services rendered in connection with the proposed purchase of certain real estate in Chicago, by the defendants. The issues were submitted to the court without a jury., and at the close of the plaintiff's evidence, the court found the issues for the defendant Stallworth, and entered a judgment against the plaintiff for costs, to reverse which the plaintiff has perfected this appeal.

It is the plaintiff's contention, in substance, that the finding of the court is against the manifest weight of the evidence, and that the testimony submitted was such as to show

that he was entitled to recover the amount sued for. The plaintiff introduced what he said was a contract between himself and the defendants, on which he based his claim. It was in the form of a letter addressed to the plaintiff and signed by Stallworth and Donovan. The services claimed to have been rendered by the plaintiff, were pursuant to the directions contained in the letter. There were two pieces of property in which Stallworth and Donovon were interested. By the letter, Stallworth and Donovon authorized the plaintiff to secure title in them, to one of the pieces of property in question for an amount not to exceed $12,000. With reference to the other piece of property, Stallworth and Donovon by their letter authorized the plaintiff to procure an option or an agreement in writing from the trustees of an estate, by which the property was owned, giving them the privilege of purchasing it at a price not to exceed $3,000. The two pieces of property in question were contiguous and they were fitted for an improvement which involved both of them. The letter contained a sentence reading that "It must be understood that we are not obliged to purchase either one of the above properties, unless, in the same transaction, we can purchase both." The last sentence in the letter read, "It is understood that you are not authorized to procure both of these properties for a sum to exceed $15,000. If secured for less, we are to receive the benefit of it."

After receiving this letter from Stallworth and Donovon, the plaintiff Clark went to work on the proposition. Stallworth returned to New York immediately after the letter

was signed by him and Donovon in Chicago. Clark testified that before he left, Stallworth told him to let Donovon know of any developments that were made. The plaintiff never succeeded in getting any written option from the trustees of the estate which owned the second place of property but he testified he told Donovon he could get that property for $3500.00 cash and that Donovon said he would refer the matter to Mr. Stallworth by letter or telegram,- that Donovon never committed himself one way or another. In this conversation, the plaintiff testified, he told Donovon that he could not get anything in writing from the trustees of the estate. The plaintiff further testified that one Maun, who was associated with him in this deal, handled the negotiations for the other piece of property; that he (the plaintiff) told Donovon in the course of the negotiations, that they could deliver the two pieces for $15,000.00, and that Donovon said that was all right as far as he was concerned, but he would have to take it up with Stallworth, as he (Donovon) did not have the money.

The letter above referred to was dated October 7, 1921. Under date of November 4, 1921, the plaintiff telegraphed Stallworth that he had arranged a meeting in his office for the following Monday morning, and requesting his presence, adding "BELIEVE CAN CLOSE FIFTEEN THOUSAND." Stallworth replied that it was impossible for him to come, because of previous engagements, but he suggested that he go ahead with the meeting and get the lowest figure possible, in writing, and he expressed the belief that the property could be purchased for less than $15,000, and urged Clark not to be in a hurry to close the matter, "as dickering will save money." On the day

the plaintiff received this message from Stallworth, he wrote Stallworth a letter explaining that there were a number of different interests involved in one of the pieces of property, and he had finally got them all to agree upon the price they were willing to take, but that he feared if the matter was not closed shortly a better offer would be made and the chance of closing the deal would be lost. The plaintiff stated that he had represented that he would have Stallworth in Chicago the following Monday for a final conference, or if not, they would "declare ourselves through at $11,500, for the corner piece." Plaintiff went on to explain that it was going to be impossible to get the adjoining piece, owned by the estate, for less than $3500.00. He closed the letter by asking Stallworth to authorize him to close the deal for the corner piece, on the following Monday, at $12,000, and the adjoining piece, owned by the estate, for $3500.00. It will be seen that this was $500.00 in excess of the top price authorized in the letter signed by Stallworth and Donovon, on which the plaintiff was acting. It does not appear what reply Stallworth made to that letter. The record contains a copy of a telegram from the plaintiff to Stallworth, under date of November 16, reading, "YOUR PROPOSITION OCTOBER SEVENTH * * * ACCEPTED BE HERE EIGHTEENTH ELEVEN A. M. FOR MEETING." Under the same date Stallworth replied to the plaintiff requesting him not to be in a hurry to close, and calling his attention to the fact that the letter of October 7th contemplated a substantial reduction from the gross amount authorized, and suggesting that the plaintiff "allow them plenty of time to come through with substantial reduction." The larger piece of property

was the corner piece and was in course of foreclosure, and in this telegram Stallworth asked the plaintiff to let him know when the property would be sold by the court. The paragraph of the letter of October 7, referred to by Stallworth in this telegram, was one in which the various charges standing against this corner piece, which was in the course of foreclosure, were set forth, showing a total amount against the property of $14,637. The letter then read, "You are authorized to secure title to said property in us providing that you can obtain a substantial reduction from amount set forth above. In our opinion, a substantial reduction would result in your securing a settlement with all the above claims, for an amount not to exceed $12,000."

After receiving Stallworth's telegram last above referred to, the plaintiff wired a reply to the effect that larger offers were likely to be made any minute and saying that he had strictly fulfilled his contract, and insisting that Stallworth wire the money to close immediately. Stallworth replied to this telegram, by a wire dated November 18, reading, "WILLING TO TAKE CHANCE ON THEIR GETTING ANOTHER OFFER YOU ARE TAKING WRONG ATTITUDE IN THIS MATTER REQUEST YOU PUT EFFORTS TO GETTING THESE AMOUNTS CUT DOWN INSTEAD RUSHING ME TO CLOSE FIRM IN BELIEF PROPERTY CAN BE PURCHASED FOR LESS THAN FIFTEEN THOUSAND AS WAS CONTEMPLATED IN LETTER." The plaintiff replied to the last telegram by a letter dated the same day. This letter was addressed to both Stallworth and Donovon and again advised them that their proposition, as set forth in their letter of October 7, "is accepted for immediate closing as per my telegram to Mr. Stallworth and re-

peated by telephone to Mr. Donovon." The plaintiff expressed the opinion that they had the bottom price on the pieces of property involved. He also said that he and Maun, who were going to share the commission, were "absorbing out of our commission a certain sum in order to close this," and that they were doing this because of their desire to handle the Ford Company business. It seems from the evidence that Donovon was a Ford agent and that if the property was secured a Ford distributing station was to be erected on the property. In reply to Stallworth's suggestion that the plaintiff was "rushing the matter," the plaintiff, in this letter, referred to a paragraph in the letter of October 7, reading, "The above transaction is to be closed as quickly as possible."

At the close of his direct examination the plaintiff was asked, "Were you able to secure title to the two pieces of property for Donovon and Stallworth for $15,000.00?" This was objected to as calling for a conclusion, and objection was sustained, to which ruling counsel for the plaintiff excepted.

Maun testified that he had done a good deal of work toward lining up the corner piece of property for sale, before October 7; that he was present at the time Stallworth and Donovon signed the letter of that date, addressed to the plaintiff, and in the course of his conversation with them he explained that the property was about to be foreclosed; that there was a second mortgage on it and he explained the negotiations he had had with the different interests, and that he could "deliver it for $11,500.00." Hefurther testified that he could secure title to the corner piece of property for that

amount.

The plaintiff wanted to put another witness on, one John W. Smyth, a real estate broker who represented the trustees of the estate owning the smaller piece of property, and it was agreed by counsel for both sides that if this witness were present he would testify that he offered to sell this piece of property to Stallworth and Donovon for $350 .00. There is also in the record a letter signed by John W. Smyth, dated October 15, 1921, addressed to the plaintiff, in which he states that one of the trustees for the estate had indicated the estate would be willing to sell the piece they owned for $3800.00, adding, "I feel myself that they might shade that price for all cash, but I am not in a position to quote a lower figure, being only the agent."

In our opinion, the plaintiff failed to make out a case, and the action of the trial court in finding the issues for the defendant was, therefore, justified. As to the corner piece of property, the plaintiff was authorized to secure title for an amount not to exceed $12,000.00. Maum did testify that he told Stallworth and Donovon that he could deliver this piece for $11,500.00. But this occurred at the time Stallworth and Donovon signed the letter giving the plaintiff authority to acquire these pieces of property for them. He was asked whether he did anything after that time, toward getting the property and whether he had negotiated with anybody, and he replied that he had not, that all of his work had been done before that. The plaintiff himself testified that they got a price of

$13,000.00 on this property. On November 5, the plaintiff wrote Stallworth, asking permission to close at a figure of $12,000.00 for the corner piece of property. Clark being the agent for Stallworth and Donovon could not establish his right to a commission by notifying them, as he did, that their proposition was accepted. It was not for their agent to accept their proposition but rather, for the owners of the property to do so, and in order to establish his right to a commission, it would be incumbent upon the plaintiff to prove that the owners accepted the proposition and were in a position to convey at the figures named.

As to the smaller piece of property owned by the estate; assuming that the agent representing the trustees of the estate testified that he offered this property for $3500.00, this would not establish the fact that the plaintiff was in a position to pass title to Stallworth and Donovon on this property at that figure. There is no proof showing that the trustees were bound to convey at that figure, nor that they agreed to do so. The letter constituting the contract between the parties, specifically states that Stallworth and Donovon are not to be bound to accept either piece unless they get both of them. In order to establish his right to the commission claimed, it was incumbent upon the plaintiff to prove that he was in a position to get title for Stallworth and Donovon to both pieces of property, for not more than $15000.00. In our opinion he failed to do so.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

155 - 29244

237 I.A. 650

KATE BRUCKMAN, Appellee, v. SAM SAMSON, ET AL, On appeal of IDA SAMSON, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The complainant, Kate Bruckman, filed a bill for partition, in the Circuit Court of Cook County, involving a six apartment building, in the City of Chicago. She alleged therein that she and Sam Samson held the property as tenants in common, each owning a one-half undivided interest; that the premises were not susceptible of division, and prayed that they be sold and the proceeds divided according to the respective interests of the parties. There was a mortgage on the premises, secured by a trust deed which is not involved here. Sam Samson filed an answer, admitting the allegations contained in the bill and consenting to the partition prayed for. Ida Samson, his wife, filed an answer, alleging that while the complainant, Kate Bruckman, and Sam Samson, who was a nephew of Kate Bruckman, derived title to the property in question by warranty deed from one Steinberg, that Steinberg was, in fact, never the real owner of the premises and paid no consideration for the title when he acquired it, but that he took title at the

Opinion filed April 29, 1926.

time the property was purchased by Sam Samson. Ida Samson further set forth in her answer that she had previously filed a bill for separate maintenance against her husband, which case was still pending; that her husband was under the influence and domination of Kate Bruckner and that the latter had been made a party defendant in the separate maintenance action; that Sam Samson and his aunt, Kate Bruckman, had conspired to deprive Ida Samson of her interest in her husband's property; that he had given Kate Bruckman large sums of money, and that he had caused a one-half interest in the property in question to be conveyed to her, without consideration, and that the bill for partition had been filed for the purpose of depriving Ida Samson, the wife of Sam Samson, of her rights and interest in his property, and that he was the real owner of the property, and the complainant, Kate Bruckman, had no real interest in it.

The issues thus formed were referred to a Master for hearing and the Master reported that the complainant and Sam Samson were the owners in fee simple of the property in question, as tenants in common, subject to the trust deed heretofore referred to; that the allegations of the defendant, Ida Samson, were not sustained by a preponderance of the evidence; that the equities in the case were with the complainant, and that all the material allegations alleged by her in her bill of complaint had been proven; that she was entitled to a partition of the premises, and he recommended that they be sold, subject to the lien of the trust deed, and that the proceeds should be divided equally between the complainant and the defendant Sam Samson. A decree was entered in the Circuit

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Court substantially as recommended by the Master. To reverse that decree, the defendant Ida Samson has perfected this appeal.

In support of her appeal, the defendant Ida Samson contends that the Chancellor erred in failing to find her interest and right in the property, as the wife of Sam Samson, and in this connection she contends that an inchoate right of dower is a valuable right and an incumbrance upon real estate. It has been pointed out by our Supreme Court that the right of dower, in a wife, subsists by reason of the seisin of her husband; that it is always subject to any incumbrance, infirmity or incident which the law attaches to that seisin, either at the time of the marriage or at the time the husband becomes seized; that one of the incidents which the law affixes to the seisin to all joint estates, is the liability, to be divested by a sale and partition, and that the inchoate right of dower in the wife is subject to that incident; and that when a husband is divested of his seisin, by some operation of law, and the realty involved is turned into personalty, the wife is, byact and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which the realty has been converted. Davis v. Long, 153 Ill. 175; Cole v. Cole, 232 Ill. 154.

In further support of her appeal the defendant, Ida Samson, contends that the findings of the Master, and the decree in accordance therewith, are not sustained by a preponderance of the evidence. An examination of the evidence discloses much conflict, and it would seem to be apparent that some

of the testimony given by the defendant, Sam Samson, as to where he procured the funds to pay for his share of the title to the property in question, was not true. The important question of fact to be determined in this case was whether the complainant, Kate Bruckman, was, in fact, a bona fide owner of an undivided one-half interest in this property. In our opinion, the Master and the Chancellor were correct in their conclusion, from the evidence, that she was. She testified that she lived in one of the apartments in the building in question, and wanted to buy it but did not have enough money herself, and she talked the matter over with her nephew, who also wanted to buy it, with the result that they purchased it together. At this time the complainant was a widow and her nephew, Sam Samson, was making his home with her, as his wife and their children were in Russia. The complainant testified that $8,000.00 was paid by Sam Samson and herself for the equity in this property, of which she paid $4,000.00; that she procured the cash with which to make this payment, from a savings account she had in the Noel State Bank. Her savings bank book was introduced in evidence, and this shows a withdrawal of $4,000.00 on July 21, 1920. She testified that she and Sam Samson took title in Steinberg. The conveyance to Steinberg was apparently made on August 2, 1920.. The complainant further testified that Samson never gave her any money; that the money which she had placed in the Noel State Bank, in her savings account, had come from the sale of her husband's business; that she had loaned some of this money to relatives, from time to time, and when they returned it she put it back in the bank. There is no evi-

dence in the record contradicting this testimony. The contention is made that title was taken in Steinberg in order to defraud the defendant, Ida Samson, and that the property really belonged to Sam Samson. If that were the object, it is difficult to understand why Steinberg later conveyed the property to the complainant and Sam Samson, and if such had been the object, one would have expected the parties to take title originally in the name of the complainant. It is apparent from the evidence that the parties had a logical reason for taking the title as they did. Steinberg testified that he first talked with Samson about purchasing this property, at the home of Mrs. Bruckman, and he was asked to buy the place in order to accomplish a saving of some money or commission. Samson testified that he and his aunt each put up $4,000.00 in cash to buy the equity in this property. Steinberg had testified that the money he had used in buying the property was turned over to him by Sam Samson. The latter testified that this money was contributed equally by his aunt and himself. He explained that they had Steinberg take title in the property in order to save $2,000.00 which a real estate man was trying to make on the deal; that this real estate man had told the complainant that the owner of the property wanted $24,000.00 for it, but they later discovered he was only asking $22,000.00. So apparently, the complainant dropped out of the deal and Steinberg offered to buy it at the figure really asked by the owner, namely $22,000.00, which involved a payment of $8,000.00 for the equity.

Samson further testified that he drew the cash which

he contributed toward the purchase of this property, from his account in the Mid-City Trust & Savings Bank. It appears that one Steinberg (not the man who took title to the property) had formerly been an employee of Samson, and he testified that part of his duties was to keep track of Samson's bank account and his funds, and that at the time the property in question was purchased, Samson told him he had withdrawn the money needed in connection therewith, from the vault, and that "so far as he knew" these withdrawals had been, $500.00 at one time, $500.00 at another time, and $7,000.00 at another time; that Samson had told him that these withdrawals were for the purpose of buying the property in question. The evidence showed that a deposit of $500.00 was made first, then another $500.00, and then the balance of $7,000.00 was paid when the deal was closed. Samson testified the two payments of $500.00 were made by the complainant, and when the final payment was made, the complainant contributed $3,000 and he contributed $4,000. The complainant testified that she made two payments of $500.00 each, and when the deal was closed, she put in $3,000.

On further examination Samson testified that he never kept any money in his vault; that he drew a check for the cash he used in this transaction; that Steinberg never had anything to do with his books, but that his duties were merely to take care of a store Samson had and sometimes take things to the customers; that sometime after the purchase of this property was made, he and Steinberg had a fight and Steinberg left; that he (Samson) always kept two or three thousand dollars in cash in his office; that he either kept it

in his pocket or hid it somewhere; that he got the $7,000.00 referred to, from the bank by check, and that he had no money in the vault; that he could not remember whether he took $7,000.00 out at one time or if he had $3,000 at one time and $4,000.00 at another time; that if he made a larger withdrawal than $4,000.00 that much was used for the purpose of closing this particular transaction and the balance for something else; that he took it out at about the time this deal was closed. The ledger sheets at the Mid-City Bank, showing his account with that bank, were introduced in evidence. Apparently the purchase of this property was consummated about August 2, 1920. The largest debit charge against his account in the month of July was $325.00 on the 30th. The largest debit charge against his account in August was one for $645.65 on the 10th. There were no debit charges supporting his testimony.

A woman named Dora Lirman testified that she knew the parties involved in this case and had talked with Sam Samson about the property in question. Apparently this witness was a customer of Samson's. She testified that when she was in the store on one occasion, she told him she had heard he gave away half of his money to his aunt, and he replied that he did; and she asked him why he did that when he had a wife and two children, and he replied that that was his own business and he didn't ask for advice, and that he could do what he pleased with his own money. Samson testified that he knew Dora Lirman but that he had had no conversation with her about this property.

We are unable to day, on this conflicting testimony that the findings of the Master, and decree of the court, were

against the manifest weight of the evidence. It is quite clear that Samson either was mistaken or was not telling the truth in all particulars. He stated that he got the money with which to close this deal, from his account in the Mid-City Bank. It is quite apparent from the ledger sheets of the bank that this could not be the case. We assume that when this witness said he got the money by check, he was referring to his own account. But the important question is whether or not the complainant contributed half of the funds with which to purchase this property, and whether such funds were her own. She testified that she did contribute $4,000.00 in cash and that it was her own money. Her bank book corroborates her so far as it can. Furthermore, the manner in which title was taken to this property, would seem to refute any contention that Samson was endeavoring to defeat his wife's interest, or to give away his property to his aunt. If those were the real objects, it would have been quite simple for him to have had title taken in his aunt or in such manner as would completely hide his connection with it. On this record we could not say that the finding of the Master and decree of the chancellor are against the manifest weight of the evidence.

For the reasons stated the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

192 - 32281

FELIKS WANATOWICZ,

Appellee,

v.

STANISLAW G. MILEWSKI and ANASTAZYA MILEWSKI,

STANISLAW G. MILEWSKI,

Appellant.

237 I.A. 650

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff brought this action in the Municipal Court of Chicago, to recover a real estate commission of $1050.00, which he claimed was due him from the defendants. The issues were presented to a jury, resulting in a verdict finding the issues against Stanislaw G. Milewski, and assessing the plaintiffs' damages at the amount claimed. Judgment followed accordingly, to reverse which that defendant has perfected this appeal.

In support of the appeal it is contended that if any commission was owing on the transaction involved, it was due, not to the plaintiff, as an individual, but to Feliks Wanatowicz & Co., which was a firm consisting of the plaintiff and one Sender. It seems that there had been such a firm consisting of the two partners named, but the plaintiff testified that the firm was dissolved prior to the time the contract in question was entered into, and the defendant in-

troduced the testimony of Bender, to the contrary. There is nothing in the record which would justify us in holding that the jury were not justified, in passing on this conflicting evidence, in believing the plaintiff.

The defendant contends further that the proof failed to show that the plaintiff produced a purchaser, ready, willing and able, to buy the property. The evidence shows that the defendants listed their property with the plaintiff and engaged him to find a purchaser. It is further shown that through the efforts of the plaintiff a purchaser was produced and that the defendants entered into a contract with the purchaser, under which the latter agreed to buy the property, on the basis of a value of $35,000. The contract involved the conveyance of some property by the purchasers to the defendants, in satisfaction of a part of this purchase price. The evidence further showed that the purchasers paid the defendants $1,000.00 down. Under those circumstances the plaintiff was entitled to his commission. No showing is made to the effect that no commission was to be paid, unless or until the transaction was consummated. A broker, being engaged to find a purchaser of property, has earned his commission when he has introduced a purchaser to the owner and the owner and the purchaser have entered into a binding contract covering the sale. When the owner enters into such a contract, it will be presumed that he has satisfied himself as to the ability of the purchaser, and, in a suit for commissions, it will not be necessary for the broker to prove that the purchaser was, in fact, ready, willing and able to go ahead with the transaction. Fox v. Ryan, 240 Ill.391

The defendant further contends that the evidence shows that the plaintiff was not a licensed real estate broker, who had complied with either the State statutes or the City ordinance. As to this point it is sufficient to point out that no ordinance was either pleaded or proven, and this court may not take judicial notice of what the ordinance may provide in that regard, and further, the evidence is not such as to show that the plaintiff had not complied with the requirements of the State statute. No issue was raised by the pleadings in this regard, and the plaintiff was not asked whether he had a State license, at the time of the transaction in question, but he was merely asked "Have you any real estate broker's license here?" and he answered, "All I have here is my registration card of 1933", which was the year in which the case was tried.

A further contention is made by the defendant to the effect that the plaintiff, under the name of Feliks Wanatowicz & Co., had given the defendant a credit of $450.00, on the real estate commission involved in this transaction, and that, therefore, even on the assumption that the plaintiff was entitled to recover, the amount of the judgment was excessive. While on the witness stand, the defendant admitted that he placed his property in the hands of the plaintiff for sale, and that the plaintiff got a buyer for him; and he testified that at that time the plaintiff said he would allow the defendant $450.00 on the commission, and the defendant introduced in evidence a receipt signed by the plaintiff, acknowledging receipt of $450.00, from Stanislaw G. Milewski, "on account of commission for selling his property." On cross-examina-

tion the defendant admitted that he was to be given this credit, "provided the deal was closed within a reasonable time after the contract was signed." The contract was dated October 17, 1922. The receipt in question was dated the same date. This case was started by the plaintiff against the defendant, in July, 1923, and the trial was had in December of that year. So far as the record shows, the contract of sale had never been carried out by the parties,- for what reason does not appear.

We find no error in the record and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

208 - 29297

WALTER ZIMMERMAN,

Appellee,

v.

JACK GOLDSTEIN, ET AL,

Appellants.

237 I.A. 650

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $250.00 recovered against them by the plaintiff, in the Municipal Court of Chicago. The plaintiff brought this action on five promissory notes for $50.00 each, all of which were signed by the two defendants and were drawn payable "to the order of ourselves." The statement of claim filed by the plaintiff did not allege that the notes sued upon were endorsed by the defendants. A copy of one of the notes sued upon was attached to the statement of claim, and it was alleged that the others were exactly like it except as to the dates of maturity. The copy of the note thus attached to the statement of claim bears no endorsement.

The defendants submitted a motion to strike the plaintiff's statement of claim. This motion was overruled and the defendants were ordered to plead. They elected to stand by their motion to strike, and the court entered an order of default against them for want of an affidavit of merits, after

which the judgment appealed from was entered.

In support of the judgment appealed from the plaintiff contends that the bill of exceptions appearing in the record was not filed within the proper time. The question of the sufficiency of the statement of claim, filed by the plaintiff in the Municipal Court, is saved for review in this court, without a bill of exceptions, for the motion to strike is treated as a demurrer to the plaintiff's pleading. Harmon v. Gallahan, 286 Ill. 58; Illinois Meat Co. v. American Malt & Grain Co., 229 Ill. App. 311.

In our opinion, the trial court erred in denying the defendants' motion to strike the plaintiff's statement of claim and in entering the judgment appealed from. The motion to strike should have been allowed. On the facts alleged in the statement of claim, the plaintiff is shown to have no case. Section 183 of the Negotiable Instrument Law (Cahill's Ill. Statutes, ch. 98, par. 205) provides that "Where a note is drawn to the maker's own order, it is not complete until endorsed by him." The statement of claim shows on its face that the notes sued upon were drawn to the order of the makers and that they do not bear the endorsement of the makers. In Kayser v. Hall, 85 Ill. 511, which was a suit based on a similar note, the court said, "The note being payable to the maker, it could have no validity until endorsed and transferred by him." A pleading based on a note drawn to the order of the maker, which has never been endorsed by him, is demurrable. Simon v. Mintz, 101 N.Y. Sup. 88; 111 App. Div. 504; Edelman v. Rose, 109 N.Y. Sup. 818. The latter case

which [illegible] [illegible] from my account.

In dissent of the judgment reversing from the plaintiff's contention that the bill of exceptions appearing in the record was not filed within the proper time. The question of jurisdiction of the questions of error, raised by the plaintiff in the Municipal Court, is proved that review in this court, without a bill of exceptions, for the notice to strike is treated as a pleading in the plaintiff's behalf. Lessman v. Phillips, [illegible] Ill. [illegible] 1[illegible]; Jones v. Grant, [illegible] Ill. [illegible] 1[illegible].

In our opinion, the trial court erred in sustaining the defendants' motion to strike the plaintiff's statement of claim and in dismissing the judgment appealed from. The motion to strike should have been allowed. In the form stipulated in the statement of claim, the plaintiff is shown to have no claim. Section 1[illegible] of the Negotiable Instruments Law (Smith's Ill. Statutes, ch. 5[illegible], par. 3[illegible]) provides that "where a note is drawn to the maker's own order, it is not complete until endorsed by him." The statement of claim shows on its face that the notes sued upon were drawn to the order of the makers — that they do not bear the endorsement of the makers. In Lessman v. Kelly, [illegible] Ill. 1[illegible], which was a suit based on a similar note, the court said: "The note being payable to the maker, it could have no validity until endorsed and delivered by him." A pleading based on a note drawn to the order of the maker, which has never been endorsed by him, is demurrable. Gibson v. Jones, 1[illegible] S.W. Rep. 8[illegible] Ill. App. 3[illegible]; Lessman v. Kelly, 1[illegible] N.E. Rep. 8[illegible]. The latter case

as well as the former, is a decision of the Appellate Division of the Supreme Court of New York.

For the reasons stated, the judgment of the Municipal Court is reversed and the cause is remanded to that court.

JUDGMENT REVERSED AND CAUSE REMANDED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

247 - 29536

DE FOREST BOWMAN,

Appellee,

v.

JOHN MCGRESCOW,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

237 I.A. 651

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Bowman, is an agency manager for the Bankers Life Insurance Company. The defendant had a term policy in that Company, which he discontinued at the suggestion of the plaintiff, and in lieu thereof took out another policy of a different type in the same Company, at an increased premium amounting to $441.50, if the premium was paid annually, or if the holder chose to pay the premium quarterly, such quarterly premium amounted to $114.80. At the time the defendant took out this new policy he was not in a position to pay cash for his first year's premium, and the plaintiff arranged to take his note for $441.50, dated September 19, 1921, which was the date of the policy. The note called for four equal installment payments of $110.38, each, with interest, payable October 19, 1921, and on the 19th days of January, April and July, 1922. The defendant made the first quarterly payment, amounting to $111.31, on November 2, 1921; the second amounting to $113.58, on January 19, 1922; and the third amounting to $114.24, on April 18, 1922. The fourth installment which was due on July

19, 1922, amounted, with interest to that date, to $115.90. The plaintiff claims that the fourth installment has never been paid. The note which had been given by the defendant was a judgment note and in August 1923, judgment by confession was entered against the defendant for $141.82, representing the fourth payment on the note, with interest, and costs. The judgment was later opened up and the defendant was given leave to plead and defend. After a hearing before the court without a jury the original judgment was confirmed. To reverse that judgment the defendant has perfected this appeal.

The defendant claimed that he had sent the plaintiff a check in payment of the fourth installment due on his note in the fall of 1922. While on the witness stand he identified his check, dated October 16, 1922, for the sum of $114.80, drawn to the order of the Bankers Life Insurance Co. (as all his previous checks had been) and he testified that he mailed that check in payment of the fourth installment on his note. It will be noted that this check was sent just before the expiration of the 30 days of grace, incident to the quarterly premium which would be due on this policy on September 19, 1922, and the amount of the check just equals the amount of the quarterly premium provided for in the policy. The defendant testified further that after sending in this payment he learned that it had been considered by the company as a payment of the quarterly premium due in September, rather than a payment of the last installment due on the note. Following this, he had some correspondence with the Company, and he testified he "told them I wanted that policy cancelled." He then testified that when

he found the Company had not applied this October check in payment of the fourth installment due on his note, he drew another check for the same amount on January 18, 1923, and in order to be certain that he was paying the fourth installment due on the note, he wrote on his check "This pays the fourth payment of my policy." This check was introduced in evidence and the writing on it is, "In payment of Policy #513813 - Fourth payment." It will be noted that this check was sent on the last day of grace incident to the payment of the quarterly premium on the policy which would be due December 19, 1922, and again the amount of the check is exactly the amount of the quarterly premium specified in the policy.

The defendant testified that he sent a letter with this check of January 18, 1923, saying in substance, that the check was sent in payment of the fourth quarterly installment due on his note, "and to please drop the whole matter, and furthermore, I demanded an account for the money I paid in excess of what I was led to believe I was supposed to pay."

On cross-examination the defendant's attention was called to the fact that the quarterly payments due on this note called for $110.38 each, with interest from the date of the note and that his first payment under the note had been for$111.21, and his second payment had been for $113.58, and his third for $114.24, and that the two checks he claimed he had sent in, in payment of the fourth installment on the note, were both for $114.80, the amount of the quarterly premium called for by the policy, and he was asked if it wasn't a fact that

he had received notices "for those two checks of $114.00?" and he answered, "Yes Sir." He was then asked, "That was your quarterly premium due on insurance for the second year?" and he answered, "I don't know."

The agency cashier of the Bankers Life Insurance Co. testified to the several payments received from the defendant. He said he was not sure that the writing on the defendant's check, dated January 18, 1923, - "In payment of Policy #513813 - fourth payment," was on the check at the time it was received. He testified that he applied it in payment of the quarterly premium, because a notice from the Insurance Company, notifying the defendant that such quarterly premium was due, accompanied the check at the time the Company received it. The plaintiff Bowman testified that sometime in September or October he went over to see the defendant at his office because the latter was aggrieved at some treatment he claimed he had received at the hands of the Company's cashier, "and wanted to talk to me." (Bowman); that the defendant then explained that he had had some business reversed and could not pay the premium then due, so Bowman suggested that he pay that quarterly premium on which he had 30 days grace, and further extension would be given him on the note, which Bowman told him he could pay off at his convenience later. Bowman testified further that the defendant then sent in his check covering the quarterly premium then due and "in order that there would be no misunderstanding in the matter" Bowman wrote him giving the amount due on the note, with interest up to that time, and explaining that the remittance just received was considered in payment of the quarterly premium

then due. Bowman was asked whether the defendant ever notified him to cancel the insurance and he answered, "Well, he got dissatisfied. That is what I went over to see him about." He further testified that after he had talked with the defendant he said he wanted to keep his insurance in force and that the remittance he had sent in had kept it in force.

The defendant denied having the conference with Bowman, which the latter testified about, and stated that he had not come to his office at any time. The defendant further testified that he made out his last two checks for $114.80, because "that is the quarterly payment * * * Both these checks was intended for one payment; the first one was not applied, so I made out the next payment for the same purpose." A little later along in the cross-examination he was asked, "And this you made out for the quarterly premium?" and he answered, "For the quarterly premium." At another point he was asked, "This amount was due on the note, including interest?" and he answered, "Yes Sir."

The fourth payment called for by the defendant's note amounted to $115.90 on its due date, which, under the terms of the note, was $110.38, with interest. The defendant admits in his testimony that he was unable to make that fourth payment when it was due, and he asked for and was given further time. It seems very strange that he should send two checks, one in October 1922, and the other in January, 1923, claiming that they were sent in payment of the fourth installment on his note, and both of these checks

should be for just the amount of the quarterly premium called for by the policy, and that they should both be sent just at the time such premiums were due under the terms of the policy, taking into consideration the 30 days of grace allowed, and that the last one should have, enclosed with it, when it was sent to the Company, the notice which the latter had sent to the defendant, advising him that a quarterly premium was due. It is also strange, if the defendant claimed that the payment he sent in October, 1923, paid up his note and (as he now claims) he cancelled his policy, that he should thereafter, (when he found that the Company claimed he had paid a quarterly premium instead of paying up his note) instead of standing his ground, send the Company another check, which he describes in his testimony as a second payment for the same thing. It would also be expected, if he considered the check he sent in October, 1923, a payment of the balance due on his note, that he would demand the cancellation and return of his note, which the record fails to show he did; and if he cancelled his policy at that time, as he claims he did, the natural thing for him to do was, at least, to offer to surrender it. It is not shown by the record that he did so.

Furthermore, the record shows that under date of May 23, 1923, after another quarterly premium had come due and the defendant had received further requests that he pay the balance still due on his note, he wrote aletter to the Home Office of the Company, saying, "By reason of my inability to get satisfactory adjustment from your local agency, I am submitting the following to you in the hope that you will

see the injustice done me in this transaction." He then went on to explain in this letter, that he had been induced by a representative of the Company to convert his term policy into another, issued by the same Company, as the term policy was approaching expiration and could not be renewed; that he asked the agent whether the policy suggested, contained certain features which he had in a policy of another company, which he was carrying, which, in the case of that policy, began after the first year, and that the agent had told him it did, whereupon, he had agreed to give up the term policy and take the new one, which had been duly issued to him. He explained further that when he received this new policy he did not give attention to its conditions, "but a few months ago, when I had my policies all gone over by one who understands the insurance business, I was told that my policy in the Bankers Life contained such privileges, but only after three year's premiums had been paid." He went on to explain in this letter that this was contrary to the understanding he had received from the agent at the time he had agreed to take the policy. He then wrote, "Of course, he denies that such privileges were promised, hence I offered to surrender the policy. At the same time I think that I am entitled to a pro rata reimbursement for the amount that I have paid on the basis that I have paid on the term policy, or to restore the term policy I had for the unexpired period." He then explained that the Company's local agent simply said that if he didn't want the policy, there was nothing to do but drop it, "of which", the defendent continued, "I do not see the justice, as I have been carrying $1,000 insurance for

about $135.00 premium per annum plus the dividend, whereas, on this policy I have been paying $441.50, which I would carry on if it contained the privileges which I asked for and understood that it would. What is your disposition in the matter? Please let me know, as I feel that this policy was issued to me under misrepresentation."

In our opinion, this letter written by the defendant months after he claims he had paid the balance due on his note and cancelled his policy, is entirely inconsistent with that position. In this letter he merely expresses dissatisfaction with the conditions of his new policy, and says that he feels the Company ought to convert it back again, in effect, to the term form of policy which he had been carrying, and let him continue that for such period as was remaining in the term, and, according to this letter, he not only does not write as though he had cancelled the policy, but even says he would carry it on, if it contained theprivileges he understood it did.

In a number of respects the testimony submitted by the two sides is in sharp conflict. This court is not in a position to say that the trial court made a finding against the manifest weight of the evidence, in concluding that the checks sent in by the defendant in October, 1922, and January 1923, were not sent in payment of the balance due on the defendant's note, but in payment of the quarterly premiums, the checks being for the exact amount of those premiums and sent at or about their due dates. It is not surprising that the trial court declined to believe the defendant's contention

that his October check was sent in payment of the balance due on his note, although it was not for the amount due on that note but was for the amount of the quarterly premium then due; and when the defendant found that the check had not been applied in payment of the balance due on his note, he sent in another payment, not immediately, but waiting until the next quarterly premium was just due and the time for its payment was about to expire, and then sent another check, for exactly the amount of the quarterly premium.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

278 - 22167.

FRANK SIMON,

Appellant,

v.

FRANK K. REILLY, doing business under the name and style of Frank K. Reilly & Co.,

Appellee.

237 I.A. 651

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Simon, brought this action in trover in the Municipal Court of Chicago, against the defendant, Reilly, seeking to recover the value of certain bonds which the plaintiff alleged the defendant had converted to his own use. The trial was had before the court without a jury, as a result of which, the court found the issues for the plaintiff and assessed his damages at the sum of one cent. Judgment being entered against the defendant for that amount and costs, the plaintiff perfected this appeal.

It appears from the evidence that the plaintiff Simon and one Dunn, had entered into a contract, involving the purchase and sale of some real estate, wherein Dunn agreed to sell and Simon agreed to buy the property involved, for the sum of $27,500. That contract called for a final payment of $14,000, and provided that of such payment $5,500 was to be in bonds of the Jackson Fire Brick Company. The real estate broker who negotiated this contract was the defendant Reilly. On March 30, 1922, the plaintiff delivered the

$5,000 in bonds, to apply on the purchase price of the property he was buying from Dunn, to the defendant and received the defendant's receipt therefor. Subsequently, for some reason, this real estate deal was abandoned and the plaintiff then sought the return of $1,000 he had paid in earnest money, and also the return of his bonds. The defendant refusing to deliver the bonds, the plaintiff brought this action against him.

The foregoing facts were brought out in the course of the plaintiff's testimony on the trial of the case. The plaintiff then called the defendant as a witness, under section 83 of the Municipal Court Act, and he admitted that the bonds had been turned over to his attorney, and he stated that he was willing to produce them subject to a lien he claimed to have against them. Forty seven of the bonds were produced in court and tendered to the plaintiff, subject to the lien which was claimed; the tender being refused. The bonds were offered and received in evidence. What the lien claimed by the defendant was for, is not suggested. Presumably it was for commissions. If so, the defendant might have a lien against the $1,000 which had been deposited as earnest money, under the terms of the contract, which is in the record, but no provision is there made for a lien against the bonds.

The defendant introduced evidence in support of his contention that neither the Jackson Fire Brick Company, the maker of the bonds, nor the Guarantee Trust Company, the trustee named in the trust deed executed to secure payment of the bonds, had ever made application to the Securities Department of Illinois for a license to sell these bonds, and in this connection the defendant contends that "the plaintiff is not in a position to secure the aid of a court of law or equity in litigation concerning illegal securities." The contention is untenable.

The questions involved here are: Did the defendant convert the plaintiff's bonds? If so, what was there value? On those matters, in such an action as this, the question of whether the sale of the bonds to the plaintiff was such as to be within all the provisions of the Securities Act, is entirely immaterial.

The defendant introduced further testimony in an effort to show that the bonds were of little, if any, value, but this testimony was quite indefinite and unsatisfactory. The plaintiff contended in the trial court that he had made a prima facie case as to the value of the bonds, by showing their face value, and the argument is made in this court, in behalf of the plaintiff, that in the absence of proof to the contrary, it should be held that the face value of the bonds was their real value. It has been held that in trover for conversion of a bond, check, note, or the like, such securities have, prima facie, their face value, because they are obligations to pay money. They are presumed to be worth their face value because everyone is presumed to be solvent and have sufficient property to pay his debts. American Express Co. v. Parsons, 44 Ill. 313; Union Trust Co. v. Rigdon, 93 Ill. 488; Hayes v. Mass.Life Ins.Co., 126 Ill. 626; The People v. Dubis, 362 Ill. 378, 381; Babcock v. Harrach, 310 Ill. 413, 419; Youngquist v. Hunter, 327 Ill. App. 152, 159.

The plaintiff having made out a prima facie case to the effect that his measure of damages was the face value of the bonds converted, it devolved upon the defendant to produce testimony to overcome that prima facie case. The only showing made by the defendant on that issue was by the testimony of a witness to the effect that in 1933, he had gone down to Tennessee and examined the records of "that county" concerning the property of

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the Jackson Fire Brick Company. Just what county the testimony referred to is not shown. He testified that he found there a record of a trust deed, conveying the property of the Company, purporting to secure a bond issue of $150,000. He also testified that this was the only trust deed on record, but "in the office of the Recorder of Deeds, the day I was there, was a trust deed made by the Jackson Fire Brick Company to the Guarantee Trust Company, purporting to secure a bond issue of $1,000,000, against the same property." This witness testified that the latter deed was not of record, and in his presence it was placed in an envelope addressed to the Guarantee Trust Company of Chicago. He further testified that this letter deed was the one purporting to secure the bonds involved in this case. This witness also testified to the physical appearance of the property of the Company in Tennessee; that the plant was not operating; that he was there just one day; and he described the property in the course of his testimony in some detail. He testified that he had no experience in connection with that sort of a plant. He gave no testimony as to the value of the plant. On cross-examination this witness testified that the Guarantee Trust Company had made some sales of these bonds and "the price at which they sold ranged from any price they could get, from fifty cents on the dollar up to a dollar five."

In our opinion, the evidence submitted by the defendant was not sufficient to overcome the plaintiff's prima facie case as to his measure of damages. It is not shown that the trust deed securing the bonds in question was never recorded or was not such as to give proper security for the payment of these bonds, and it is not shown that the bonds were worth less than their face, and if so, what. Under those circumstances, we are of the opinion that the trial court, in awarding damages

to the plaintiff should have fixed them at the face value of the bonds.

In the brief filed by the defendant in this court, his counsel, after setting forth in his "brief of points" ten points and fifty three authorities, opens his two page argument by saying: "An examination of the cases cited in the brief of points and a fair analysis of the evidence heard by the trial court will convince the reviewing court that the judgment in this case should be affirmed or judgment should be entered in this court or in the court below, for the defendant because the plaintiff is not in a position to secure the aid of a court of law or equity in litigation concerning illegal securities." In other words, after making ten points and citing fifty three authorities in his brief of points, counsel tells this court than an examination of the authorities as cited and a fair analysis of the evidence heard by the court, will convince us that the judgment appealed from should either be affirmed or reversed. He then proceeds, for the balance of the two page argument, without making a single reference to any one of his fifty three authorities or a single statement about the evidence. To put it mildly, such a brief is utterly useless in any court.

For the reasons we have stated, the judgment of the Municipal Court is reversed and judgment is entered here for the plaintiff for the sum of $8,000.00, with interest at five per cent, from April 28, 1933, (thirty days after the bonds were delivered to the defendant, which was the date on which the plaintiff testified he asked the defendant to return his bonds) amounting in all to $8,095.00.

JUDGMENT REVERSED AND JUDGMENT HERE.

O'Connor, P.J. and
Taylor, J. concur.

287 - 29376

FORT DEARBORN FURNITURE COMPANY, a corp.,

Appellee,

v.

GALLIPOLIS FURNITURE MANUFACTURING COMPANY, a corp.,

Appellant.

237 I.A. 651

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed April 29, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Fort Dearborn Furniture Company brought this action in the Circuit Court of Cook County, on two promissory notes, each for the sum of $1206.40. The notes were signed by the Gallipolis Furniture Company, and endorsed by the American Furniture Company, by Hyman Rash. Service of summons was had on the maker only. The defendant filed a plea of the general issue, notice of set-off and affidavit of defense, admitting execution of the notes but alleging that it had a set-off against the plaintiff in the sum of $2500.00. On motion of the plaintiff the defendant was ordered to file a bill of particulars. This was filed, and on plaintiff's motion, it was stricken and defendant was given leave to file an amended bill of particulars in connection with its claim for set-off. The amended bill of particulars was filed, and again, on plaintiff's motion, it was stricken, together with the notice of claim for set-off and the affidavit of defense, and thereupon, the court, for want of an affidavit of defense, assessed the

Opinion filed April 29, 1958.

plaintiff's damages at $2532.80, and entered judgment against the defendant for that amount and costs.

Counsel for the defendant states in the brief filed in this court, that an appeal was prayed by the defendant from the order striking the amended bill of particulars and the affidavit of defense and assessing the plaintiff's damages and in entering judgment thereon, which was allowed. The record shows that no such appeal was prayed or allowed. On the contrary, two days after these orders were entered, the defendant submitted a motion to vacate the orders and judgment previously entered, which motion the trial court overruled and the appeal which has been perfected in this court is an appeal from the order of the trial court denying that motion to vacate.

The only argument represented by the defendant in this court in support of its appeal is to the effect that its amended bill of particulars was sufficient and that the trial court erred in allowing the plaintiff's motion to strike it, and in striking the defendant's affidavit of defense, and assessing damages and entering judgment against the defendant. As pointed out by this court in Lake Shore Sand Co. v. Goodman, 85 Ill. App. 363, an appeal from an order denying a motion to set aside a judgment, brings up nothing for review in this court except the order from which the appeal was prayed, and on such appeal this court is precluded from considering any alleged error claimed to have occurred in the course of the trial or in the entering of the judgment. So far as the record shows, the defendant made no showing whatever in support of its motion to vacate, and no argument

is made in this court with regard to the action of the trial court in denying the motion to vacate.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

113 - 29201

4 - 29440

4436

237 I.A. 651

DEREE & COMPANY, Defendant in Error, vs. LOUIS G. NIEMAN et al., Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Louis G. Nieman and Elias Nieman, the defendants, from a judgment on a verdict in the sum of $187.50 against the defendants in an action brought by Deree & Company, the plaintiff.

The only grounds on which the defendants ask for a reversal of the judgment relate to the evidence, and as there is no bill of exceptions in the record the questions cannot be considered.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

197 - 29286

237 I.A. 651

CARL EHRHARDT,
Appellee,

vs.

FREDERICK W. PROUDFOOT,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit brought by Carl Ehrhardt, the plaintiff, against Frederick W. Proudfoot and Lucius S. Brown, the defendants, to recover damages for an alleged breach of contract on the part of the defendants. Service was not obtained on Lucius S. Brown, as he was a non-resident. He did not enter his appearance.

The case was tried before a jury and the jury rendered a verdict against the defendant Frederick W. Proudfoot in the sum of $2750. Judgment was entered on the verdict. From the judgment the defendant prosecuted this appeal.

The only question in the case is whether the verdict is manifestly against the weight of the evidence.

The issues in the case relate to transactions concerning certain buildings situated in the city of Chicago, known as the Lessing and Lessing Annex buildings, of which Lucius S. Brown was the owner.

The evidence, in addition to being largely documentary, consists of oral testimony describing in detail the various transactions in regard to the buildings. We do not deem it necessary to state all of the evidence. We shall merely set out enough to render intelligible the material questions involved.

Brown and Ehrhardt became acquainted sometime before January or February, 1919, in a conversation over the telephone.

At the time Brown was in the city of Pensacola, Florida, and Ehrhardt was in the city of Chicago, Illinois. After the telephone conversation, namely, about January or February, 1919, Brown came to Chicago and he and Ehrhardt met.

At this time Brown was in financial difficulties in regard to the buildings. A first mortgage was being foreclosed and the foreclosure had proceeded as far as the decree of sale. The equity of redemption had about a year to run. Approximately $325,000 was necessary to redeem the property. Brown and Ehrhardt had negotiations in respect of the buildings, which resulted in the signing of certain written agreements by them.

On February 6, 1919, the following agreement was signed by Brown:

"Chicago, Ill., Feb. 6th, 1919.

Carl Ehrhardt,
Beecher, Ill.

Dear Sir:

With the understanding that you will protect my interest as disclosed by my affidavit in your possession, in the Lessing and Lessing Annex buildings, situated in Chicago, Illinois, by bringing suit through a Chicago lawyer to set aside the second Mortgage Bond Issue of Three Hundred Thousand Dollars now filed of record against the property, you to pay all costs of litigation; I hereby assign and Quit Claim an undivided one-half interest in the Lessing and Lessing Annex, Chicago, Illinois, to you. You are also given the right to trade or sell the property subject to my acceptance of the deal.

Yours very truly,
(Signed) L. S. Brown."

February 14, 1919, the following agreement was entered into between Brown and Ehrhardt:

"Memorandum of Agreement, made and entered into this 14th day of February, A. D. 1919, by and between Carl Ehrhardt, of Chicago, Cook County, Illinois, party of the first part, and Lucius S. Brown, of Pensacola, Florida, party of the second part.

The party of the first part hereby agrees to consummate the following stipulations:

First: He is to procure a letter from C.C.Mitchell of C. C. Mitchell & Company of Chicago, Illinois, to a prospective purchaser for the property known as The Lessing and Annex, at a price of Four Hundred Fifty Thousand Dollars ($450,000.00) cash.

Second: When this Contract is signed, then the party of the first part agrees to negotiate the purchase of the second

mortgage bonds on the above described premises consisting of thirty (30) bonds of Ten Thousand Dollars ($10,000.00) each, now held by the Receiver of the Heard National Bank of Jacksonville, Florida, at a price not exceeding Thirty Thousand Dollars ($30,000.00) including a certain note of Five Thousand Dollars ($5,000.00) held by said Receiver and signed by L. S. Brown, said note to be turned over to L. S. Brown. The right is reserved by said L. S. Brown to acquire the bonds at any price less than Thirty Thousand Dollars ($30,000.00), together with above mentioned note, to be turned in upon this agreement at the same price that he purchases the same, he to retain note.

Third: When the above conditions are met, then the party of the first part is to arrange to take up the first mortgage on said property, that is, the first mortgage shall be purchased from the Trustees of the Lehman Estate for an amount not exceeding the decree entered by the court, minus all credits due on account of rents, etc.

The party of the second part hereto agrees to deposit his quit-claim deed on the above described premises in escrow with the Chicago Title & Trust Company, and it is hereby agreed by both parties that all papers connected with this deal and all moneys received in this deal shall be deposited with the Chicago Title & Trust Company in escrow, and the Chicago Title & Trust Company shall be directed to pay the different items above stated to the respective parties, and the surplus money shall be paid as follows: Fifty (50) per cent of the surplus shall be paid to the party of the first part and fifty (50) per cent shall be paid to the party of the second part, and the Chicago Title & Trust Company shall be directed by an escrow agreement to fulfill all conditions herein.

It is also agreed that the party of the second part, if necessary, shall deliver to the Chicago Title & Trust Company any disclaimer on the above premises by J. J. Heard which may be required by the Chicago Title & Trust Company in order for them to issue their guarantee policy on the above described premises. The expenses for issuing a guarantee policy on the above described premises to the purchaser shall be treated as an item of expense, and if it is necessary to negotiate a new first mortgage loan on the said premises in order to close this deal, the expense of said loan shall be borne by the party of the first part.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Carl Ehrhardt, (Seal)
L. S. Brown, (Seal)"

February 15, 1919, the following affidavit was made by Brown:

"Lucius S. Brown, on this 15th day of February, A. D. 1919, first being duly sworn on oath, deposes and says that he resides in Pensacola, Florida; further, that he is the same Lucius S. Brown who holds title to the following legally described property to-wit: (The description follows) ------

Furthermore, the deponent says that on or about the Twenty-eighth (28th) day of October, A. D. 1916, he signed a certain Trust Deed and Bonds, said Trust Deed recorded as document number 5985346, and deponent further says that said Trust Deed and Bonds were left with the Chicago Title & Trust Company, a corporation

of the State of Illinois, and that he, said Lucius S. Brown, did not receive any consideration whatsoever from or through the said Chicago Title & Trust Company nor has he ever received any consideration from or through them or others.

Therefore, the deponent, Lucius S. Brown, gives Notice to the World of his intention to bring suit in a court of Cook County, State of Illinois, for the recovery of said Trust Deed and Bonds recorded as Document No. 5,985,346.

Further the deponent sayeth not.

(Signed) Lucius S. Brown."

February 19, 1919, an application was made by Ehrhardt for a loan of $375,000 from S. C. Mitchell & Co. The application is as follows:

"Chicago, Feby. 19, 1919.

S. C. Mitchell,
Title and Trust Building, Chicago.

You are hereby authorized to negotiate for me a loan of $375,000, payable $1000.00 per month for 77 months and balance $298,000.00 due at end of eightieth month, to bear interest from the date this application is accepted at 6 per cent per annum, payable semi-annually, evidenced by judgment principal and interest notes, in gold coin of the United States of America, of the present standard of weight and fineness and secured by a First Mortgage or Trust Deed of your usual form, constituting a first and only lien free from dower, homestead or other rights on the following described real estate: The Leasing Apartments and the Leasing Annex. *** Said premises are free and clear from encumbrance of any and every kind and description except an encumbrance 1st, $400,000, 2nd $300,000 to Lehman estate and Chi Title & Trust Co. Trustee, due now. I have authority to encumber the same, and there is no person in possession of said premises or any part thereof claiming adversely to me.

Title to property in Lucius S. Brown - I have contract of purchase from Brown. The name of my wife is Flora H. Ehrhardt and she will sign Trust Deed.

I agree to furnish a mortgage policy of title insurance to be made by companies you shall designate, covering and showing said loan to be a first and only valid lien on the above described premises.

You are hereby authorized, but not bound, in behalf of myself, my heirs, assigns and grantees, until all indebtedness secured by the above Trust Deed is fully paid, to place at board rates in such companies as you may select, all insurance upon all buildings and improvements on said premises for the full insurable value of the same, each policy to run for such time, not exceeding five years, as you may deem proper, and to contain proper loss clauses.

As compensation for your services in placing such insurance you shall be entitled to any commission at regular board rates obtained by you, and all premiums on said policies I agree to pay promptly on demand.

Guarantee and insurance policies to be held by you or the owner of said principal note as collateral with said loan and kept until loan is paid.

In consideration of this application I agree to pay all expenses or advances made or incurred for guarantee policies, recording, insurance, taxes, or for the removal of liens or claims against said premises and to pay as commission 5 per cent on the amount of said loan, all of which amounts may be deducted from any loan obtained if not previously paid by me.

Remarks: I am refinancing the above properties and purchasing them as an investment.

(Signed) Carl Ehrhardt (Seal)."

In connection with this application the following escrow agreement, signed by Ehrhardt and Brown, was delivered to the Chicago Title & Trust Company:

"E. #34963 Chicago, February 21, 1919.

Chicago Title & Trust Company

Lucius S. Brown deposits a quit-claim deed from himself and wife to Carl Ehrhardt, conveying:

Lots 13, 14, 15 and 16 in Block 1 in Gilbert Hubbards Addition to Chicago, a subdivision in the S.E.¼ of the N.W. ¼ of Section 28, 40-14 in C. C. I.

Also, Lots 14-15-16 in Block 3 in LeMoyne's Subdivision of the S. 16 acres of the E. ½ of the N. W. ¼ of Sec. 28-40-14 in C. C. I.

John J. Heard is to deposit a quit claim deed from himself and wife to Carl Ehrhardt to said premises, also a disclaimer by himself and wife of any interest in said premises; also

Signed duplicate of an order to C. L. Williams, Receiver for the Heard National Bank of Jacksonville, Florida, authorizing the sale of trust deed recorded as Doc. 5985346, and bonds for the sum of $26,000.

C. L. Williams is to deposit as Receiver for the Heard National Bank of Jacksonville, Florida, a trust deed from Lucius S. Brown to the Chicago Title and Trust Company dated October 28th, 1916, and recorded in Cook County, Illinois, November 2nd, 1916, as document 5985346, also 30 bonds for $10,000 each secured by said trust deed.

Also a promissory note signed by L. S. Brown dated payable to the order of the Heard National Bank in the sum of $8,000.

Carl Ehrhardt is to deposit a trust deed from himself and wife to the Chicago Title & Trust Co., conveying said premises and given to secure an indebtedness amounting to $375,000.

Also a trust deed from himself and wife to Chicago Title and Trust Co. and a principal note for $37,500, payable on or before April 11, 1919, with interest at the rate of six per cent per annum, payable semi-annually.

S. C. Mitchell & Co. are to deposit $375,000.

As soon as all deposits have been made herewith, you are then authorized and directed to record said trust deeds from said Ehrhardt above mentioned, and providing the records of Cook County show no other conveyance, liens, judgments or incumbrances affecting the title to said premises since July 28nd, 1918, and prior to the recording of said trust deed, you are then authorized and directed to record the quit claim deed from said Brown to said Ehrhardt, and if in your opinion

it becomes necessary to record the quit claim deed from said J. J. Heard to said Ehrhardt, you are authorized so to do, and as soon as you are prepared issue your mortgage ($375,000) guaranty policy in the usual form, guaranteeing the trust deed securing above mentioned, to be a first lien on said premises, subject only to

1. Mechanics Lien Claim, if any, where no notice thereof appears of record.
2. Special Assessments not confirmed, or confirmed after July 22nd, 1918.
3. Taxes for the year 1918.
4. All installments of special assessment Warrant 43851 falling due after 1919.
5. Existing leases.

You are then hereby authorized and directed to disburse said money as follows:

1. Pay a sum sufficient to obtain a release of trust deed recorded as Doc. 4931396, and dismissal of suit in case #B.36939 Circuit Court, including the discharge of the Receiver therein.
2. Pay C. L. Williams, Receiver, for the Heard National Bank of Jacksonville, Florida, $26,000 and cancel trust deed recorded as Doc. 5985346 and the bonds secured thereby, and release the same.
3. Pay installment of special assessment warrant #43851 falling due in 1919.
4. Redeem from all tax sales which the Chicago Title & Trust Co. consider liens on said premises.
5. Pay a sum sufficient to obtain a release of a judgment in case B.36995 Circuit Court.
6. Pay to the Chicago Title & Trust Co. for guaranty policy, recording fees and escrow fee.
7. Pay C. C. Mitchell & Co. commission and cost of printing bonds.
8. Pay balance as directed by Carl Ehrhardt.
9. Cancel said $5,000 note of said L. S. Brown and deliver same to him.
10. Deliver $37,500 note to Lucius S. Brown.

If all of said deposits are not deposited herewith on or before March 22, 1919, then any of said deposits so made are to be returned to the respective depositors upon demand.

(Signed) Lucius S. Brown,
(Signed) Carl Ehrhardt."

February 25, 1919, C. C. Mitchell wrote the following letter to the Chicago Title & Trust Company agreeing to make a loan of $375,000 on the property:

"February Twenty-fifth, 1919.

Chicago Title & Trust Company,
69 West Washington Street,
Chicago.

Attention Mr. H. C. Jenkins.

Gentlemen:

At the suggestion of Mr. C. W. White we are writing to advise you that we have agreed to make a loan of $375,000 on the Lessing Apartments and Lessing Annex, said loan to be signed by Mr. Carl Ehrhardt. We would greatly appreciate it

if you would advise us immediately upon receipt of the second mortgage bonds now outstanding and other instruments necessary to complete this title, so that we may prepare our Trust Deed for record.

Yours very truly,
(Signed) G. C. Mitchell,
President."

March 6, 1919, Brown wrote the following letter to the Chicago Title & Trust Company, extending the escrow agreement:

"March 6, 1919.

C. E. Jenkins, Esq.,
Chicago Title & Trust Co.
also
Carl Ehrhardt, Chicago, Ill.

Under Escrow #34963, you are hereby instructed to extend time of deposits from Mch. 22, 1919, to Sept. 22,1919.
L. S. Brown."

March 6, 1919, the following agreement was signed by Brown and Ehrhardt:

"In consideration by Lucius S. Brown of extension of Escrow #34963: We hereby agree to begin suit at once to recover second mortgage bond, and have trust deed securing same expunged from record. We also in further consideration agree to bear all expenses of suit or otherwise and further it is agreed that the gross profit is to be divided equally or fifty-fifty basis between Brown and Ehrhardt upon sale of property.

L. S. Brown,
Carl Ehrhardt,
By C. W. White,
His Agent."

The $300,000 of bonds were delivered by Brown to the Heard National Bank of Jacksonville, Florida, apparently with the expectation that the Bank either would land him the money on the bonds or sell the bonds for him. Subsequent to the delivery of the bonds to the bank by Brown, the bank failed and C. L. Wilkinson was appointed receiver and took possession of the bonds. The receiver Wilkinson offered the bonds for sale and Ehrhardt attempted to buy the bonds. He sent C. Wilbur White to Florida for that purpose. White made an unsuccessful bid for the bonds. Albert W. Haywood bought the bonds.

March 17, 1919, a contract was entered into between Brown and Ehrhardt, parties of the first part, and Frederick W. Proudfoot, party of the second part. This contract is the contract on which the action in the case at bar is based. The contract contains recitals purporting to explain the status of affairs relative to the buildings at the time the contract was entered into. The contract is as follows:

"This Agreement, made and entered into by and between L. S. Brown and Carl Ehrhardt, parties of the first part, and F. W. Proudfoot, party of the second part, Witnesseth:-

That, Whereas, said parties have heretofore entered into a Contract between them for the handling, sale, etc., of the Lessing Apartments and the Lessing Annex in Chicago, Illinois, which said Contract is now in force and is to remain in force pending the issues contemplated hereunder.

And Whereas, it is considered necessary for the mutual protection and benefit of the said parties that legal proceedings be begun and prosecuted to establish the actual status of Three Hundred Thousand Dollars ($300,000.00) of alleged bonds, secured by a second mortgage on said properties, and now in the control and possession of one Albert W. Haywood and divers other persons interested with him.

Now Therefore, in consideration of legal services already performed by said second party and to be performed by him in behalf of said first parties, the latter hereby agree to employ and by these presents do engage and employ the said party of the second part as and for their Solicitor and Counselor to conduct any suit or suits at law or in equity, that may seem necessary or expedient to bring and prosecute against the alleged rights of the said Albert W. Haywood and all others in privity, and combination with him, under and by virtue of the possession and retention of Three Hundred Thousand Dollars ($300,000.00) worth of second mortgage bonds, secured upon the said Lessing and Lessing Annex.

And as a further consideration between the parties hereto, it is agreed that full, frank and open knowledge and discussion shall be had by said parties at all times relative to the matters and things involved and contemplated herein. And further agreed between them that no settlement or compromise be made of any of the rights and interests herein referred to without being first submitted to each of the parties hereto and their respective consent and agreement to be obtained relative thereto if possible, but in any event the decision of any two of the three parties hereto shall be conclusive and binding upon the third.

And as a further consideration of the above the said first parties hereby agree as and for compensation to the said second party hereunder, to pay him such a sum of money or the equivalent as shall equal one-quarter of whatever may accrue, come to or be realized by said parties of the first part jointly or severally from and out of the interests now

existing or hereafter to be made and established out of any and all dealings, handling, sale or otherwise whatsoever of the said Lessing and Lessing Annex and the said first parties to better secure the said second party against accident, death or otherwise and in further consideration of the above, hereby and by these presents do assign and set over unto said second party, the aforesaid one-quarter part and portion to be taken and possessed whenever desired and available.

And it is further agreed between the parties hereto that said Carl Ehrhardt shall pay and advance when necessary all costs and expenses incidental to the preparation, prosecution and success of the litigation contemplated herein and that there shall be no further obligation upon the parties of the first part unto the party of the second part, than that contained herein and upon the success of the plans and purposes referred to.

Witness the hand and seals of the parties hereto, made and entered into, in triplicate, this 17th day of March, 1919.

(Signed) L. S. Brown,
(Signed) Carl Ehrhardt,
By S. W. White, his agt.
(Signed) F. W. Proudfoot."

Before Ehrhardt had met Proudfoot, White had a conversation with Proudfoot in which he told Proudfoot about "this particular deal," and that he, White, represented Ehrhardt in the matter. White also told Proudfoot that the right of redemption had about expired on the Lessing and the Lessing Annex buildings, and that Brown held the right of redemption; that there were some judgments against Brown, and that Brown was afraid to come to Chicago for that reason; that he, White, was going to induce him to come to Chicago to see if he, White, could get anything out of the equity. White told Proudfoot that he, White, wanted Ehrhardt protected "in this matter owing to the fact that he was going to put up all the money that was necessary for" him, White, "to make trips to see if he could not get possession of a second mortgage against the property which was held against the property." Proudfoot told White that if White brought in Ehrhardt, he, Proudfoot, would file a bill and would represent Ehrhardt and Brown together.

After White's interview with Proudfoot, White took Ehrhardt and Brown to the office of Proudfoot, and the contract

set out above, dated March 17, 1919, was entered into between Ehrhardt, Brown and Proudfoot. March 25, 1919, suit was begun by Proudfoot on behalf of Ehrhardt and Brown. The defendants were Albert W. Haywood and Newton B. Lauren. The prayer of the bill was that the thirty bonds in the sum of $300,000 should be brought into court and delivered up for cancellation, and that the trust deed securing the payment of the bonds should be released. According to the testimony of Proudfoot and Brown, they had a conversation with Ehrhardt in August, 1919, in which Brown told Ehrhardt that he, Ehrhardt, had had the exclusive right of sale of the property for seven months and had done nothing, that Ehrhardt's "jig" was "up on September 22."

Proudfoot testified that after September 22, 1919, he had a conversation with White and Ehrhardt, in which Ehrhardt said Brown was treating him, Ehrhardt, badly; that he. Proudfoot, told Ehrhardt that he, Ehrhardt, had taken a lot of Brown's time; that Brown "was up against it," and that he, Ehrhardt, had better go ahead and see what he could do; that he, Proudfoot, said, "We are all trying to make the sale; now do something with it. The first fellow that can put anything up to Brown that is acceptable, I think can do business with him, and he will pay a good round compensation for the trouble."

September 23, 1919, Brown wrote Ehrhardt and White the following letter terminating his agreement with them:

"Messrs. Carl Ehrhardt and C. W. White,
Chicago, Illinois.
Gentlemen:

It has been more than two weeks since leaving Chicago, during which time I have not had one word from you.

It has become necessary, inasmuch as our agreement has terminated to inform you to this effect.

I want to render you every assistance possible and would have granted an extension had you evidenced any sign of an early sale, but you have not anything of a definite nature in sight, therefore, will call everything off until you consult with Mr. Proudfoot. I am asking Mr. Proudfoot to take up the

work of handling this matter for the reason that he is familiar with the details, and has done considerable work in this connection.

Yours very truly,
L. S. Brown."

December 1, 1919, Brown wrote Proudfoot the following letter asking Proudfoot to act exclusively for him:

"Jennings, Fla., Dec. 1st, 1919.

Mr. F. W. Proudfoot,
First Nat. Bank Bldg.,
Chicago, Ill.

Dear Mr. Proudfoot:

Agreeable to my talk with you just before leaving your city, I want to assure you again that notwithstanding that I have severed all connection whatsoever with Carl Ehrhardt, as you know; I now engage you exclusively to act for me as my representative and attorney in fact, in all matters hereafter concerning my interests in The Lessing and Lessing Annex.

For such services as I shall expect of you, I hereby agree to pay you a sum equal to one-quarter of whatever I may realize hereafter net from said properties.

I trust this will meet with your approval and enlist your earnest co-operation.

Yours very truly,
(Signed) L. S. Brown."

Ehrhardt made numerous efforts during June or July, 1919, and August or September, 1919, to dispose of Brown's equity in the property. Proudfoot was informed by Ehrhardt of these efforts. In October, 1919, Ehrhard was still negotiating in a deal begun in August or September, 1919, with a Mr. Stenger, who was the owner of a ranch in South Dakota. Stenger came to Chicago in October, 1919, and Ehrhardt informed Proudfoot that Stenger was in Chicago.

Ehrhardt testified that on January 16, 1920, he asked Proudfoot "if he had any deal on" in regard to the Lessing and Lessing Annex buildings, and that Proudfoot said he had not. Proudfoot testified that about January 5 or 6, 1920, Ehrhardt asked him if there was a deal made on the Lessing Annex, and that he told Ehrhardt that there was "a deal pending with certain Cleveland parties, but they had not come through with the money,"

and that he "did not know whether they were going to or not."

January 13, 1920, Proudfoot wrote and signed in his own handwriting the following telegram, which was sent to Brown by Ehrhardt:

"January 13, 1920.

To: L. S. Brown, Jennings, Fla.

Shall I sign contract for ten thousand acres unincumbered Georgia land and fifteen thousand in cash for equity on your favorable wire money will be deposited with Chicago Title & Trust Co.

(Signed) F. W. Proudfoot."

January 13, 1920, Proudfoot delivered to Judge Vail, who represented Frederick A. Bartlett, a deed covering Brown's interest in the Lessing and Lessing Annex buildings for $35,000.

Proudfoot testified that when the telegram of January 13, 1920, was sent he does not think that he told Ehrhardt that he was then in negotiations with Judge Vail or anyone to sell the property to Frederi k A. Bartlett.

At the time the deed was delivered by Proudfoot to Judge Vail the suit which Proudfoot had begun as solicitor for Ehrhardt and Brown was still pending. September 10, 1920, the suit was dismissed on the stipulation of the parties to the suit. Proudfoot signed the stipulation as "Solicitor for Complainants." Proudfoot testified that he did not consider that he was signing the stipulation as Ehrhardt's solicitor; that Ehrhardt was a nominal complainant. Proudfoot also testified that he never made a formal withdrawal of his appearance as solicitor for Ehrhardt.

The substance of the contentions of counsel for defendant Proudfoot are that "the interests and rights" of Ehrhardt in the Lessing and Lessing Annex buildings were contingent upon Ehrhardt's performance of his contract of February 14, 1919, the escrow agreement as part of that contract,

and the extension of the escrow agreement until September 22, 1919; that within the period of time which expired on September 22, 1919, neither Ehrhardt nor his agent, White, secured a purchaser of Brown's equity in the buildings at the purchase price of $450,000, nor a purchaser at any price that was satisfactory to Brown.

Counsel for Ehrhardt maintain that the contract of February 6, 1919, "expresses the intention of the parties and defines their rights;" that the contract referred to in the contract of March 17, 1919, between Ehrhardt, Brown and Proudfoot, "could only be the contract of February 6, 1919;" that the contract of March 17, 1919, specifically provided that it "is to remain in force pending the issues contemplated hereunder;" that it also specifically provided that "full, frank and open knowledge and discussion shall be had by said parties at all times relative to the matters and things involved and contemplated herein;" that it further specifically provided that "no settlement or compromise be made of the rights and interests herein referred to without being first submitted to each of the parties hereto and their respective consent and agreement to be obtained relative thereto, if possible, but in any event the decision of any two of the three parties hereto shall be conclusive and binding upon the third;" that this last specific provision would be meaningless "if Ehrhardt had the duty of procuring said thirty bonds;" that further the provision in the contract of March 17, 1919, that "Proudfoot was to be paid one-fourth of any profits realized 'by the parties jointly or severally * * out of any and all dealings, handling, sale or otherwise' of said property establishes without question that the parties were not considering any special or particular deal or sale and demonstrates the falseness of appellant's contention that Ehrhardt was in duty bound to consummate a supposed deal then pending under the contract of February 14th

and the escrow of February 21st, and that his interest was contingent upon his successfully closing the deal."

In considering the evidence in this case it must be borne in mind that Proudfoot was the attorney of Eberhardt. It is the duty of an attorney to act toward his client with the most scrupulous good faith and fidelity. 6 Corpus Juris, p. 682; Miller v. Lloyd, 181 Ill. App. 230, 238. It is the duty of an attorney to disclose all facts that may come to his knowledge affecting his client's interests in any manner. Miller v. Lloyd, supra, (p. 238). An attorney cannot avail himself of any settlement obtained through an undue advantage, by withholding facts in his possession as such attorney. Staley, Adm'x v. Dodge et al., 30 Ill. 43, 45, 46.

We are of the opinion that there is ample evidence to sustain the contentions of the plaintiff; and as the verdict of the jury was in favor of the plaintiff, we do not think the verdict should be disturbed.

Counsel for the defendant, Proudfoot, contends that "the court erred in refusing to give instructions appearing on pages 174, 175, 176, 177, 178, 179, 180 and 181, as requested by the defendant." The instructions are not set out in the brief of counsel for the defendant, Proudfoot, and the alleged errors are not pointed out and argued. We presume the "pages" on which counsel states that the instructions appear are the pages of the abstract. This method of presenting instructions for consideration by a court of review has been held to be improper. General Platers Supply Company v. Charles F. L'Hommedieu & Sons, 228 Ill. App. 201, 206.

We think that the jury were fully and fairly instructed on the material issues in the case.

Counsel for the defendant, Proudfoot, further contends that "the court erred in refusing to allow the defendant to show the various acts of the parties in the matter of withdrawing the escrow and of cancelling Ehrhardt's contract with Brown." The evidence referred to is not indicated and the phrase "various acts of the parties" is too vague and indefinite to enable us to determine what acts are meant. In order that the objection may be reviewed, counsel for the defendant should have pointed out the particular acts referred to. Stradtmann v. County of Menard, 158 Ill. 153, 158; C. & A. R. R. Co. v. Strawboard Co., 190 Ill., 268, 276; Haick v. American Car & Foundry Co., 155 Ill. App. 261, 262.

We are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

McCurdy, P. J., and Matchett, J., concur.

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CENTRAL BOND & MORTGAGE COMPANY,
Plaintiff in Error,

vs.

JOHN ROESER,
Defendant in Error.

237 I.A. 652
ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by the Central Bond & Mortgage Company, the plaintiff, from an order of the Municipal court of Chicago denying the relief prayed for in a petition filed by the plaintiff to expunge from the record certain orders entered in an action brought by the plaintiff against John Roeser, the defendant, on an alleged breach of contract by the defendant. In the original action brought by the plaintiff against the defendant, when the case was called for trial the defendant failed to appear. The plaintiff proceeded to trial before a jury and on March 25, 1923, obtained a verdict in the sum of $1160.

May 12, 1923, forty-seven days after the entry of the judgment, the defendant made a motion to vacate and set aside the judgment. In support of the motion the defendant filed the following affidavit:

"Albert E. Charles being first duly sworn on oath, states that he is the attorney for John Roeser, defendant in the above entitled cause.

Affiant further states that on March 26, 1923, an ex parte judgment was rendered against the defendant, John Roeser, in said cause for the sum of Eleven Hundred Sixty Dollars and costs, and that execution thereon was issued May 4, 1923.

Affiant further states that he has been a member of the Chicago Bar since 1897, and practiced continuously in the courts of Cook County, Illinois.

Affiant further states that for the past two years he has employed as his special stenographer one Miss Kleth; that as part of her duties she looks after the court calls of cases of which this affiant is attorney, and that said Miss Kleth has been diligent and careful and attentive to her duties; that this affiant has depended upon her to watch the court calls, and that the said Miss Kleth by accident overlooked the call of the above entitled case on March 5, 1923, March 21, 1923, and March 26, 1923.

Affiant further states that he had no knowledge that said case had been reached for trial or was on any trial call.

Affiant further states that on information and belief John Roeser has a good defense to the whole of plaintiff's claim; that the defense of said defendant is fully set forth in Statement of Claim wherein defendant denies that by reason of any breach of contract on his part, plaintiff was compelled to and did buy in for the account of defendant twenty (20) shares of Humboldt State Bank Stock, and that the prevailing market price of said stock on October 24, 1921, was $200.00 a share; that defendant at any time entered into contract in writing with plaintiff with reference to the sale of shares of Humboldt State Bank stock, as alleged in plaintiff's statement of claim.

Affiant further states that he learned for the first time on May 10, 1923, that judgment had been entered against said defendant in said cause on March 26, 1923.

Affiant further states that he is willing upon setting aside of order and reinstating of said cause to pay attorneys for plaintiff a reasonable fee, such as the court may fix.

Affiant further states that in case said judgment was not set aside and cause reinstated, that this affiant would have to pay said judgment and costs; that same would be a burden and great hardship on this affiant.

Affiant further states that the judgment entered is as follows:

> 'March 26, 1923 - Trial by ex parte by jury. Verdict issue versus defendant John Roeser damages Eleven hundred and sixty and 00 Dollars Judgment on verdict versus defendant, John Roeser, Eleven Hundred Sixty and oo Dollars ($1160) and costs May 4 - Execution issued 414553.'

Affiant further states that no valid judgment was entered in said cause as judgment entered is only against defendant, and is not in favor of anyone, and for that reason judgment should be quashed and set aside.

Affiant further states in all justice defendant should have a hearing on the merits of said cause; that the rights of plaintiff will not be prejudiced by an order setting aside judgment and setting said cause for trial."

The court granted the motion of May 12, 1923, and vacated and set aside the judgment. A trial of the case was then had before a jury on May 22, 1923, and the plaintiff participated in the trial. The jury found a verdict in favor of the defendant. The plaintiff made a motion for a new trial, which was entered and continued. February 11, 1924, the petition of the plaintiff to expunge certain orders from the record was entered and continued.

March 7, 1924, the motion of the plaintiff for a new trial was heard by the court and was allowed. The case was set for trial on April 14, 1924. March 7, 1924, the petition of the plaintiff to expunge certain orders from the record was heard by

the court and was denied. When the case was called for trial April 14, 1924, the plaintiff failed to appear and the defendant obtained a judgment as in case of a non-suit.

The petition of the plaintiff to expunge certain orders from the record contained a statement of the proceedings subsequent to the order of May 12, 1923, which granted the motion to vacate and set aside the judgment in favor of the plaintiff of March 26, 1923. The petition prayed that the order of May 12, 1923, be vacated and expunged from the record on the ground that the court was without jurisdiction to enter the order.

It is contended by the plaintiff that the order of May 12, 1923, granting the motion to vacate the judgment of March 26, 1923, was an interlocutory order, and that, therefore, the procedure followed by the plaintiff in participating in the trial subsequent to that order was correct and proper. In support of its contention the plaintiff cites the cases of People v. Wells, 255 Ill. 450, 452, 455, and Walker v. Oliver, 63 Ill., 199, 200, which held that where an order setting aside a judgment is not final, it is necessary to try the case again, obtain a final judgment, and then error may be assigned on the order of the court setting aside the first judgment. The rule is similarly stated in the cases of Cramer v. Commercial Men's Ass'n, 260 Ill., 516, 519, and City of Park Ridge v. Murphy, 258 Ill., 365, 367.

The defendant maintains that the order of May 12, 1923, was an appealable order, and that since the plaintiff failed to appeal, and participated in the second trial, the plaintiff has waived its right to question the validity of the order of May 12, 1923.

We are of the opinion that the contentions of the defendant are correct. If the motion and the affidavit of the defendant constitute a proceeding under Section 21 of the Municipal

Court Act, then unquestionably the order of May 12, 1923, which granted the motion to vacate the judgment of March 28, 1923, was a final and appealable order. Imbris v. Bear, 230 Ill. App., 158, 159; Collins v. Drab, 209 Ill. App. 447; Barnes v. Chicago City Ry. Co., 188 Ill. App. 148, 150, 151. It has been held in the analogous proceeding under Section 89 of the Practice Act, in relation to a motion in the nature of a writ of error coram nobis, that an order in that proceeding is a final and an appealable order. Cramer v. Commercial Men's Ass'n, supra; Bishop v. Illinois Western Electric Co., 321 Ill. App. 141, 144; Di Meo v. Hines et al. 229 Ill. App. 487, 489.

Was the motion to vacate the judgment of March 26, 1923, and the affidavit of the defendant in support of the motion a proceeding under Section 21 of the Municipal Court Act? Section 21 provides in part as follows:

> "If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside, or modified by a bill in equity; Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court."

Since the motion to vacate the judgment of March 26, 1923, was made by the defendant after thirty days from the entry of the judgment, the order of May 12, 1923, granting the motion to vacate and set aside the judgment was invalid unless, in support of the motion, the defendant made a showing which brought the defendant within the provisions of Section 21 of the Municipal Court Act. American Surety Co. of New York v. Bliss, 214 Ill. App. 463, 465.

Section 21 provides the only method by which the Municipal Court can vacate judgments after thirty days. Stendle v. Manthie et al, 185 Ill. App. 576, 577. Therefore, if the motion and the affidavit on behalf of the defendant did not relate to Section 21, there would be no other source from which the court could derive authority to consider the motion and the affidavit.

In our view the motion and the affidavit on behalf of the defendant in support of the motion must be treated as a proceeding begun under Section 21 of the Municipal Court Act. Doyle v. Fallows, 207 Ill. App. 5; and as part of the common law record.

When considered as a pleading in such a proceeding, the affidavit was wholly insufficient to authorize the court to vacate the judgment. If the sufficiency of the affidavit had been questioned by the plaintiff by a motion to strike it from the record, or by any other appropriate practice, the court should have held the affidavit insufficient. The record, however, does not show that the sufficiency of the affidavit was attacked by the plaintiff. The question whether the defendant was entitled to an order vacating the judgment was a question of fact, and the evidence that may have been introduced on the hearing is not shown by the record. The motion of the defendant, the affidavit of the defendant in support of the motion, and the proceedings relating to the motion, are not preserved by the plaintiff in a bill of exceptions taken within thirty days after the entry of the order of May 12, 1923, allowing the motion, nor within any period of extension granted by the court within thirty days. It is true that the petition of the plaintiff to expunge from the record the order of May 12, 1923, which granted the motion of the defendant, is preserved by a bill of exceptions, and that the petition recites that counsel for the plaintiff opposed the granting of the motion of May 12, 1923, on the following grounds:

> "1. That the court had lost jurisdiction of the above entitled matter by reason of lapse of time since the entry of said judgment, and that the court was without jurisdiction to make any order effecting the judgment and that said judgment could not now be subject to be set aside, except upon appeal or writ of error, or bill in equity, or a petition containing all the essential facts to sustain such a bill.

Section 21 provides the only method by which the Municipal Court can vacate a judgment entry. Bonnell v. Lumbrazo ex rel., 106 Ill. App. 378, 379. Therefore, if the motion and the affidavit on behalf of the defendant did not relate to Section 21, there would be no other means than which the court could derive authority to consider the motion and the affidavit.

In our view the motion and the affidavit on behalf of the defendant in support of the motion must be treated as a pleading falling under Section 21 of the Municipal Court Act. Bonnell v. Zalaiens, 307 Ill. App. 3; and as part of the common law record.

When considered as a pleading in such a proceeding, the affidavit was wholly insufficient to authorize the court to vacate the judgment. If the sufficiency of the affidavit had been challenged by the plaintiff by a motion to strike it from the record, or by any other appropriate pleading, the court should have held the affidavit insufficient. The record, however, does not show that the sufficiency of the affidavit was challenged by the plaintiff. The question whether the defendant was entitled to an order vacating the judgment was a question of fact, and the evidence that may have been introduced on the hearing is not in us by the record. The motion of the defendant, the affidavit of the defendant in support of the motion, and the proceedings relating to the motion, are not preserved by the plaintiff in a bill of exceptions taken within thirty days after the entry of the order of May 12, 1938, allowing the motion, nor within any period of extension granted by the court within thirty days. It is true that the petition of the plaintiff to expunge from the record the order of May 12, 1938, which granted the motion of the defendant, is preserved by a bill of exceptions, and that the petition recites that counsel for the plaintiff opposed the granting of the motion of May 12, 1938, on the following grounds:

"1. That the court had lost jurisdiction of the above entitled matter by reason of lapse of time since the entry of said judgment, and that the court was without jurisdiction to make any order affecting the judgment and that said judgment could not now be subject to be set aside, except upon appeal or writ of error, or bill in equity, or a petition containing all the essential facts to sustain such a bill.

2. That the motion and affidavit tendered in support of said motion was insufficient in law to confer any jurisdiction upon the court to make any order affecting the aforesaid judgment, and that any action taken on said motion would be void."

The bill of exceptions in which the plaintiff's petition to expunge the order of May 12, 1923, from the record was preserved, was not signed until after the expiration of thirty days from the entry of the order of May 12, 1923, and was not signed pursuant to any extension of time granted by the court within the thirty days. Consequently the recitals in the petition, that the plaintiff opposed the granting of the motion of the defendant, cannot be considered in connection with the proceedings relating to the motion.

Under Section 23, paragraph 6, of the Municipal Court Act, the bill of exceptions should have been taken within thirty days from the entry of the order of May 12, 1923, which allowed the motion of the defendant, or within an extension of time granted by the court within that period. Smedley v. American Engineering & Construction Co., 181 Ill. App. 461, 462; Carter v. Hines, 176 Ill. App. 72, 73, 74. This practice in the Municipal court is in accordance with the practice in the Circuit and Superior courts. In these courts the rule is that the bill of exceptions must be taken at the term at which the rulings excepted to were made, or within such time as the court may at that term have granted. Franklin Park v. Franklin, 228 Ill. 591, 592; People v. Strauch, 247 Ill., 221, 225; Finch & Co. v. Zenith Furnace Co., 245 Ill., 586, 590; City of East St. Louis v. Vogel, 276 Ill., 490, 495.

Even if the order of May 12, 1923, which granted the motion of the defendant to vacate the judgment of March 26, 1923, should be considered as an interlocutory order and not an appealable order, the plaintiff is not in a position to question its validity in the absence of a bill of exceptions.

In holding that the affidavit of the defendant, in the absence of a bill of exceptions, should be held to be sufficient to

sustain the order of May 12, 1923, vacating the judgment of March 26, 1923, we have followed the recent case of Harris v. Chicago House Wrecking Co., 314 Ill., 505, 506, 507, 508. That case is so closely analogous to the case at bar that we consider the decision conclusive. In that case a motion to vacate a judgment in the Circuit court after term time was involved. In support of the motion an affidavit was filed, which was very similar to the affidavit of the defendant in the case at bar. The pertinent parts of the affidavit in the case of Harris v. Chicago House Wrecking Co., supra, are as follows:

> "that in the above entitled cause, through mistake and inadvertence in his office, the said cause was stricken off of the calendar on July 18, 1914; that having no knowledge that the case had been so stricken, affiant was not advised and had no knowledge that it was a case within the order of January 22, 1915, and did not, therefore, look for the case in the calendar, made up pursuant to said order, of all common law cases stricken from the docket from the date of the Chicago fire to and including the 31st day of December, 1914, and being so ignorant the case was again stricken from said last named calendar on June 18, 1915; that a great and irreparable injury will be done to plaintiff in said cause if it is not re-instated, owing to the fact that the Statute of Limitations will be run, and that said injury has resulted through the oversight in affiant's office of the fact that said cause was originally stricken. Affiant therefore asks that the said cause may be reinstated and set down for trial at such time as the court may direct."

And the court held that the motion and the affidavit constituted a proceeding under Section 89 of the Practice Act which provided for motions in the nature of a writ of error coram nobis and that the affidavit should be deemed sufficient in the absence of a bill of exceptions showing that its sufficiency had been questioned. The court said (pp. 505, 506, 507, 508):

> "We have very distinctly and positively held that the motion is the commencement of a new suit at law to which new issues are made up, and that such suit is independent of the proceeding in which the judgment sought to be set aside was rendered and an entirely different suit at law. ***** So we hold that this was a declaration or motion setting forth alleged facts under section 89 of our statute. Whether or not this declaration on its face discloses such errors of fact as would be sufficient to recall a

be sufficient to recall a judgment is immaterial in the consideration of this case. Appellee failed to raise any question of law concerning the sufficiency of this declaration by demurring to it or by filing a plea of nulla est erratum or by a motion to dismiss. We have held that such is the proper practice, and that where the sufficiency of a declaration is not questioned in the above manner or by some other proper mode recognized to test the validity thereof, on appeal no question of law can arise in the Appellate court or in this court as to the sufficiency of the declaration. We have also indicated that it is incumbent upon a party to plead to the declaration in some manner, and if he is satisfied with the sufficiency of the declaration or motion and allegation of facts he should file a plea denying the truth of the facts stated in the declaration. There was no demurrer or plea to the declaration shown in this record. There is no counter-affidavit denying the facts. There is no demurrer to the evidence or sworn statement as to the facts made by appellant's attorney. *** As the case stands, no question of law is presented on this record either as to the declaration or as to the sufficiency of the evidence. It was purely a question of fact as to whether or not there was an error of fact committed by the court which culminated in a judgment or order dismissing the suit, and appellee has preserved no record entitling it to review or question the facts. There is therefore no question properly before this court as to whether or not the declaration stated, or whether the evidence proved, an error of fact in the former proceedings in support of the judgment or order. The court pronounced judgment against the appellee and entered the order aforesaid, and it must be considered as without contest on the part of appellee, because the record does not disclose properly any defense or any objection to the court's order. In order to preserve for review a ruling upon objections of a party, whether the same be as to the jurisdiction of the court or otherwise, such objections must be preserved by a bill of exceptions or its equivalent, under our Practice Act. Such objections or exceptions cannot be preserved by mere recitals in the judgment or order.*** We may state in conclusion that it is true that appellant's declaration in the new suit was subject to demurrer if one had been interposed. The facts therein stated were not errors of fact within the meaning of section 89 of the Practice Act. Nevertheless, the order re-instating the cause is binding. Where a court has jurisdiction of the subject matter and of the parties, defects in the pleadings and in the proofs are not sufficient ground for reversing a judgment questioned collaterally."

It may be argued by the plaintiff that if from the analogy of the case of Harris v. Chicago House Wrecking Co., supra, the affidavit in the case at bar is to be treated as in the nature of a declaration or petition in a new suit under Section 21 of the Municipal Court Act, and if the affidavit does not state facts necessary to bring the suit within the provisions of Section 21, in other words, does not state a cause of action,

the first time on appeal, and furthermore, although a bill of exceptions would be necessary in order to entitle the plaintiff to a review of the facts on the hearing under Section 21, no bill of exceptions would be necessary to show that the sufficiency of the affidavit was attacked by the plaintiff if the affidavit on its face did not state a cause of action.

However, the case of Harris v. Chicago House Wrecking Co., supra, is controlling in the case at bar.

Counsel for the plaintiff maintain that the case of People v. Wells, 255 Ill. 450, supra, holds that in a proceeding begun under section 21 of the Municipal Court Act, an order vacating a judgment thirty days after the entry of the judgment is not a final appealable order. It is true that the opinion so holds. But the precise question whether such an order was final and appealable was not directly involved in the decision.

The expression of the court was merely an obiter dictum. The question which the court was considering was whether mandamus would lie to expunge from the record an order entered by the Municipal Court vacating a judgment thirty days after the entry of the judgment. In discussing the question whether the existence of another adequate remedy at law would bar relief by mandamus, the court said it would not, that the existence of another adequate remedy at law might be a matter of importance to be considered, but the court added arguendo that the relator did not have another remedy at law as the order vacating the judgment thirty days after the entry of the judgment was not a final appealable order. The case of People v. Wells, supra, has not been followed on the holding in question. Furthermore, from the analogy in the case of Harris v. Chicago House Wrecking Co., which holds that an order in a proceeding under Section 89 of the practice act is a final appealable order, it follows that an order in the similar proceeding under section 21 of the Municipal Court Act is also a final

the Court then as appeal, and furthermore, although a full or exceptions would be necessary in order to confine the pleadings to a review of the facts on the lower court record, in this of exceptions would be unnecessary in that case the conflicting of the evidence are admitted by the plaintiff. I am satisfied on the case and not state a cause of action.

However, the case of Morris v. Ohio Power Housing Co., supra, is controlling in the case at bar.

Counsel for the plaintiff maintain that the case of People v. Wells, 286 Ill. 486, supra, holds that in a proceeding begun under section 11 of the Municipal Court Act, an order vacating a judgment thirty days after the entry of the judgment is not a final appealable order. It is true that the opinion so holds. But the precise question whether such an order was final and appealable was not directly involved in the decision.

The expression of the court was merely an obiter dictum. The question which the court was considering was whether mandamus would lie to compel from the record an order entered by the Municipal Court vacating a judgment thirty days after the entry of the judgment. In discussing the question whether the existence of another adequate remedy at law would bar relief by mandamus, the court said it would not, that the existence of another adequate remedy at law might be a matter of importance to be considered, but the court added arguments that the relator did not have another remedy at law as the order vacating the judgment thirty days after the entry of the judgment was not a final appealable order. The case of People v. Wells, supra, has not been followed on the holding in question. Furthermore, from the analogy in the case of Morris v. Chicago Housing Authority Co., which holds that an order in a proceeding under Section 89 of the practice act is a final appealable order, it follows that an order in the similar pro-

Act

appealable order.

Counsel for the plaintiff further contend that there is a distinction between the affidavit in the case of Harris v. Chicago House Wrecking Co., supra, and the affidavit in the case at bar in that in the former case the court held the affidavit was in the nature of a motion, while in the case at bar the record does not show a motion. The affidavit in the case at bar does not in terms purport to be a motion, but as no formal pleadings are required in the Municipal Court, we think that it sufficiently appears from the face of the affidavit that it is intended as a motion.

Since we have held that the motion of the defendant to vacate the judgment of March 26, 1923, and the affidavit of the defendant in support of the motion constituted a proceeding under Section 21 of the Municipal Court Act, and since we have held further that the order of May 12, 1923, vacating the judgment of March 26, 1923, was a final and appealable order, it follows that by participating in the second trial the plaintiff waived its right to question the jurisdiction of the court to enter the order of May 12, 1923. Weisguth v. Supreme Tribe Ben Hur, 272 Ill. 541,543; Grand Pacific Hotel v. Pinkerton, 217 Ill., 61,83,84; Herrington et al. v. McCollum, 73 Ill., 477,479; Zandstra v. Zandstra, 226 Ill. App. 293,305,306; Ringholm v. Fitzgerald et al, 208 Ill. App. 268, 270, 271; Wilson v. Chandler, 133 Ill. App. 622, 627, 628; Lox et al v. Bradley, 179 Ill. App. 1, 2, 3; Schafer v. Moe, 72 Ill. App. 50, 51.

In the case at bar the plaintiff not only participated in the second trial, but on the second trial was granted a new trial, and on the call of the case for the third trial the plaintiff failed to appear and the defendant obtained a judgment as in the case of a non-suit.

For the reasons stated in the opinion the order of the trial court is affirmed.

AFFIRMED.

McSurely, P.J., and Matchett, J., concur.

appealable error.

Counsel for the plaintiff-respondent contend that under the clarifying Statute, the litigants on the case in question, Orange Grove Trading Co., supra, had the privilege to use that it was that in the lower court the issue had been litigated as in the nature of a contract, while in the instant case it was not a contract. The difficulty in the case is that the sum all is there subject to a motion, and in an Municipal Court, large are involved in the municipal court, so that error is manifestly appears from the face of the affidavit that it is intended as a motion.

Since we have held that the motion of the defendant to vacate the judgment of March 26, 1926, and the affidavit of the defendant in support of the motion constituted a proceeding under Section 21 of the Municipal Court Act, and since we have held further that the order of May 12, 1926, vacating the judgment of March 26, 1926, was a final and appealable order, it follows that by participating in the [illegible] proceedings, [illegible] May 12, 1926. Wekenrath v. Supreme Grand Men Auxiliary, 272 Ill. 243, 248; Grand Pacific Hotel v. Chamberlin, 217 Ill., 61, 63, 64; Kerrigan et al. v. McGoldrick, 72 Ill., 17, 19; [illegible], 222 Ill. App. 292, 295, 308; Bingham v. Bingham et al. 208 Ill. App. 266, 270, 271; Wilson v. Chandler, 128 Ill. App. 622, 627, 628; Lux et al v. Bradley, 179 Ill. App. 1, 2, 3; Webster v. Moe, 72 Ill. App. 50, 51.

In the case at bar the plaintiff not only participated in the second trial, but on the second trial was granted a new trial, and on the call of the case for the third trial the plaintiff failed to appear and the defendant obtained a judgment as in the case of a non-suit.

For the reasons stated in the opinion the order of the trial court is affirmed.

AFFIRMED.

39 - 29498

237 I.A. 652

SIMON F. MERRIWEATHER,
Appellee,

vs.

NATIONAL LIFE INSURANCE CO.
of U. S. A.,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The plaintiff, Simon F. Merriweather, brought an action against the defendant, the National Life Insurance Co. of U. S. A., to recover indemnity under an insurance policy insuring the plaintiff against accidental injury. The case was tried before a jury and the jury returned a verdict in favor of the plaintiff in the sum of $1200. From the judgment on the verdict the defendant prosecuted this appeal.

The evidence shows that the plaintiff while boarding a street car fell and was injured; that he was totally disabled for two years and was unable to work. The plaintiff testified that when he fell he struck the back of his head. The physician who attended the plaintiff testified on behalf of the plaintiff that the plaintiff had aphasia. In the opinion of the physician the "disability" of the plaintiff was due to a diseased condition and was not due to an accident.

The insurance policy provided as a condition precedent to recovery that the plaintiff should furnish the insurance company every thirty days a report in writing from his attending physician or surgeon, fully stating the condition of the plaintiff and the probable duration of his disability.

Counsel for the defendant contend that the plaintiff made no attempt to show a compliance with this provision of the

insurance policy, and that in this state of the record the court should have directed a verdict in favor of the defendant.

Counsel for the plaintiff maintain that there was sufficient evidence to justify the court in submitting to the jury, as an issue of fact, the question whether the plaintiff complied with the provisions of the insurance policy, and that furthermore, even if there was not sufficient evidence to raise an issue of fact, the evidence shows that the defendant waived the requirements of the provision.

We think that if the plaintiff failed to make proof that he complied with the provision, he cannot recover.

In our opinion there was not sufficient evidence to justify the court in submitting to the jury the question whether the plaintiff complied with the provision.

We are also of the opinion that the plaintiff cannot rely on a waiver of the provision by the defendant for the reason that the plaintiff did not plead a waiver. The defendant gave notice to the plaintiff that on the trial of the case the defendant intended to offer the provision in evidence and to prove that the plaintiff failed to comply with the provision. The plaintiff did not plead that the defendant had waived the requirements of the provision. The general rule is that where a plaintiff relies on facts which show a waiver of performance, he must plead such facts and he cannot plead performance and recover under proof of waiver of performance. Walsh v. North American Cold Storage Co., 260 Ill. 322, 331; Metal Fireproofing Co. v. Reyes, 233 Ill. 284, 289; Feder v. Midland Casualty Co., Ill. App. Gen. No. 28426.

Counsel for the defendant contend that the court erred in refusing to allow the jury to consider certain evidence introduced by the defendant. The evidence was as follows: That the plaintiff was a member of a Relief Association of the Chicago,

Burlington and Quincy Railroad Company; that under his certificate of membership, he was entitled to benefits for two years on account of disability caused by sickness and was entitled to life indemnity on account of disability caused by accident; that he did not make out the claims for relief himself, but they were sent to the company by the examining physician who called upon the plaintiff once a month for a period of two years; that the plaintiff was paid indemnity under the provisions for sick benefits; that at the termination of the period for which benefits were payable, the plaintiff was notified that the period had ended and no further indemnity was paid to him. The by-laws of the relief department of the Chicago, Burlington and Quincy Railroad Company were read in evidence by counsel for the defendant. The defendant offered to show "that no objection was made by the plaintiff, nor was any claim asserted by the plaintiff under the accident provisions of his certificate in the Relief Association." The court instructed the jury to disregard the evidence.

It is contended by counsel for the defendant that the evidence was admissible for the purpose of showing an admission against interest by the plaintiff; that if the plaintiff had a valid claim for life indemnity he would not accept a less sum without any objection; that he would have asserted his right to further payments.

It will be observed that the evidence in question relates to the plaintiff's conduct in respect of a claim for indemnity in a collateral matter, wholly unrelated to his claim against the defendant.

To determine the question whether the plaintiff's conduct in the collateral matter could be considered as an admission against interest in the case at bar, would necessitate the trial of a distinct, separate, substantive claim against the Chicago, Burlington & Quincy Railroad Company, amounting

in effect to the trial of another case. We do not think that the probative value of the fact which counsel for the defendant desired to prove was sufficient to justify the court in allowing such procedure. In our view the evidence was inadmissible.

Counsel for the defendant further contend that the court erred in refusing to give the following instruction requested by the defendant: "The court instructs the jury that as to any matter herein the burden of proof whereof is upon the plaintiff under other instructions given you, if you do not find and believe from the evidence that it preponderates in respect to its weight and credibility in favor of plaintiff, or in case you are unable to determine whether plaintiff has sustained such burden of proof, or in event you find and believe that the evidence is evenly balanced, then as to such matter you will find against plaintiff and in favor of defendant."

We are of the opinion that the court properly refused to give the instruction. The clause with which the instruction begins, namely, "The court instructs the jury as to any matter herein the burden of proof whereof is upon the plaintiff under other instructions given you," is indefinite and ambiguous and improperly leaves to the jury the question of determining the matters as to which the burden of proof rested on the plaintiff.

Counsel for the defendant further contend that the trial court committed reversible error in giving the following instruction on behalf of the plaintiff: "If you believe from all the evidence that the plaintiff was actually insured by defendant, that he was in an accident while the policy with defendant was still in force, that he contracted aphasia immediately after said accident, that he never had aphasia prior to the accident, then you may reasonably infer if you so believe from the evidence, that the aphasia contracted by plaintiff was caused solely by this accident."

We are of the opinion that the instruction is erroneous and that the giving of it by the court constituted prejudicial error. Obviously it is a nonsequitur to say that if one never had aphasia before an accident and had it after an accident, the reasonable inference would be that the accident caused the aphasia. Counsel for the plaintiff maintain that the clause "if you so believe from the evidence" relieved the instruction of any error; that the physician who attended the plaintiff stated that aphasia could be caused by such an accident. There was evidence that aphasia generally could be caused by an accident, but there was no evidence that the aphasia of the plaintiff could have been caused by the accident.

The attending physician testified that "it was possible for a person to fall and hit the back of his head and get an injury that would affect his speech." But in regard to the question whether there was any causal connection between the accident and the aphasia in the case at bar the physician testified on behalf of the plaintiff, as we have previously stated, that in his opinion the disability was due to a diseased condition and was not due to an accident. The physician was also called as a witness by the defendant, and he testified as follows: "I am still of the opinion that Mr. Merriweather's disability was due to illness and not to an accident." But even if there was evidence that the accident could have caused the aphasia, we do not think that the clause relied on by counsel for the plaintiff obviated the error in the instruction. In our view it is probable that the jury understood the instruction to mean that if the plaintiff was injured in an accident, and after the accident had aphasia and did not have it before the accident, then the jury could reasonably infer that the accident caused the aphasia.

For the reasons stated in the opinion the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

McCurdy, P. J. and Matchett, J., concur.

160 - 29576

287 I.A. 652

BANK OF UNITED STATES,
Appellee,

vs.

B. MUNVES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, B. Munves, from a judgment in the Municipal court of Chicago in the sum of $1866.93 in favor of the plaintiff, the Bank of the United States.

The statement of claim of the plaintiff is as follows:

"That on or about the 28th day of December, A. D. 1922, one Edgar M. Weinstein engaged in the business of manufacturing ladies' clothing, using the trade name of Ideal Garment Company, assigned to plaintiff herein certain accounts receivable, among them the accounts of Marie Hendrickson and Sig Lilliamthal aggregating the total amount of $1866. Plaintiff further states that said assignment was made by the said Weinstein as aforementioned to the plaintiff in writing and made for a valuable consideration which assignment plaintiff is ready to produce upon the hearing of this cause. Plaintiff further alleges that on or about the 26 day of December, 1922, and on or about the 27th day of December, 1922, the defendant herein was in receipt of vouchers or checks in payment of said account of Marie Hendrickson, which vouchers or checks were made payable to the order of Ideal Garment Company, yet the defendant, without authority in the premises, converted to his own use said checks by endorsing and depositing the same to an account held by him knowing of the assignment of said accounts to the plaintiff herein and plaintiff further alleges that afterwards the defendant herein converted to his own use money received from Sig Lilliamthal as aforementioned and that by reason of said assignment and by reason of said conversion by the defendant herein of said moneys, the property of the plaintiff herein, the defendant is indebted to the plaintiff in the sum of $1,866, for which it brings its suit."

It will be observed that the statement of claim alleges that the defendant converted "the moneys, the property of the plaintiff."

Assuming that there was a conversion by the defendant, the evidence does not show that the defendant converted any money or property of the plaintiff, but that he converted the money or property of the Ideal Garment Company. Counsel for the plaintiff

do not dispute this state of the record. In fact, they explicitly admit in their brief that "the defendant in this case received this money as the agent of the Ideal Garment Company," and that "he converted the moneys belonging to his employer."

In our opinion there is a fatal variance between the statement of claim and the proof.

Counsel for the plaintiff contend, however, that the question of variance was not properly raised in the trial court. Counsel for the plaintiff are in error in this statement. The question of variance was raised on behalf of the defendant at the close of the plaintiff's evidence and was renewed at the close of all the evidence.

Counsel for the plaintiff further maintain, in connection with the question of variance, that "inasmuch as the pleadings in all classes in the Municipal court are now the same *** precision and exactness are not required."

Presumably the contention of counsel for the plaintiff is that in the Municipal court the evidence is not limited to the issue made in the statement of claim. The case of Salter Cabinet Co. v. Russell, 250 Ill., 416, holds the contrary. In that case the court said (pp. 420, 421):

> "While the formalities of pleading have been abolished by statute, it is still the law in the municipal court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim, and the evidence must be limited by that statement. The issue cannot be enlarged by oral claims or affidavits filed in the case."

Although we are of the opinion that the judgment in the case at bar should be reversed because of the variance we have indicated, nevertheless we have examined the evidence and have reached the conclusion that the defendant was not guilty of conversion.

The judgment of the trial court is reversed.

REVERSED.

McSurely, P. J., and Matchett, J., concur.

444a

29586

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237 I.A. 652

IRVING G. ZAZOVE,
Appellee,

vs.

THE AMERICAN LAW BOOK COMPANY
OF NEW YORK, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the American Law Book Company of New York, the defendant, from a judgment of $322.50, in favor of the plaintiff, Irving G. Zazove, in an attachment proceeding begun by the plaintiff in the Municipal court of the City of Chicago. The case was tried before the court without a jury.

The material facts are substantially as follows: The plaintiff entered into a written contract with the defendant to purchase certain law books from the defendant by the payment of installments in amounts prescribed by the contract. When the plaintiff had paid installments amounting in the aggregate to $387.50, an action was brought against him by the defendant in the Municipal court to recover a balance of $132 alleged to be due to the defendant according to the terms of the contract. A judgment against the plaintiff was obtained by the defendant for the sum of $122. An execution was issued on the judgment. While the execution was in the hands of the bailiff the plaintiff paid the amount of the judgment to the bailiff and then immediately caused a writ of attachment to be served on the same bailiff by the bailiff himself, attaching the money he, the plaintiff, had just paid to the bailiff. The claims in the attachment proceeding, briefly stated, are that the contract provided that upon the payment of $322.50 the plaintiff was to receive all of the books

contracted for; that the defendant failed to deliver all of the books; that by reason of the breach of contract on the part of the defendant the plaintiff was entitled to recover the $322.50 that he had paid.

We are of the opinion that the trial court erred in entering a judgment in favor of the plaintiff.

Assuming for the sake of argument that the plaintiff was entitled to receive all of the books on the payment of $322.50, he had not paid that amount until he paid the bailiff the $122 due on the judgment which the defendant had obtained against him; and the defendant's duty to deliver the books did not arise until the payment of the $122 had been made. According to the plaintiff's theory of the case, the defendant only could have been in default in respect of the delivery of the books during the time intervening between the payment of the $122 and the service of the writ of attachment. But the two acts were almost simultaneous. According to the general rules of law relating to the performance of the conditions of a contract, if there is an absence of contractual stipulation, a party is allowed a reasonable time within which to perform the conditions. 13 C. J., p. 653; Hamilton v. Scully, 118 Ill., 192, 198. We think that by analogy this rule is applicable to the case at bar. It is obvious then that the defendant did not have a reasonable time within which to deliver the books, and was not, therefore, in default.

The judgment of the trial court is reversed.

REVERSED.

McSurely, P. J., and Matchett, J., concur.

182 - 29598

GREAT WESTERN SMELTING AND REFINING COMPANY, a corporation,
Appellee,

vs.

O'MALLEY-BEARE VALVE COMPANY, a corporation,
Appellant.

237 I.A. 653

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the O'Malley-Beare Valve Company, the defendant, from a judgment on a verdict against the defendant, in an action brought by the Great Western Smelting and Refining Company, the plaintiff, to recover damages for an alleged breach of contract by the defendant. The case was tried before a jury. At the close of all of the evidence the court instructed the jury to return a verdict against the defendant in the sum of $1826.76.

The material facts are not in dispute. On November 6, 1920, the defendant sent the following written order to the plaintiff for brass ingots:

"100,000 lbs. brass ingots - 85% copper, 5% tin, 5% lead, 5% zinc, at 14 c lb.

200,000 lbs. brass ingots - 80% copper, 10% tin, 10% lead, at 15 c lb.
to be delivered as requested F.O.B. Hackett Spur, Burnside, Cook Co., Ill.
Ship to 255 East 95th Street, Chicago, Illinois, via I. C. Order No. 3389.
We reserve the right to countermand this order if delivery is not made at time specified.

O'Malley-Beare Valve Co.,
G. A. Mackem, Secretary."

Under this order various shipments of ingots were made by the plaintiff to the defendant as the ingots were requested by the defendant. The last shipment was made about January 17, 1921. From November 6, 1920, the date of the order, to January 17, 1921, the plaintiff delivered to the defendant 200,000

pounds of the 80-10-10 ingots, and 54,331 pounds of the 100,000 pounds of the 85-5-5-5 ingots, making a total of 254,331 pounds out of the total of 300,000 pounds provided for by the order, and leaving a balance of 45,000 pounds of the 85-5-5-5 ingots undelivered.

On April 16, 1921, the plaintiff wrote the defendant the following letter:

"O'Malley-Beare Valve Co.,
Chicago, Illinois.

Gentlemen:
My attention is called to balance of Red Ingot Brass that we are owing you, and we would appreciate very much if you would give us specifications for delivery.
Respectfully yours,
Great Western Smelting & Refining Co.,
Ivan Reitler,
President."

Apparently the defendant made no reply to this letter, and on May 2, 1921, the plaintiff wrote the defendant the following letter:

"O'Malley-Beare Valve Co.,
Chicago, Ills.

Gentlemen:
I find no reply to our letter of the 16th ult., in connection with Red Ingot Brass due you. We are very anxious to clean this old lot up if you can use the material to advantage at this time, and would accordingly appreciate your letting us hear from you, and if possible furnishing us with definite shipping instructions.
Respectfully yours,
Great Western Smelting & Refining Co.,
Ivan Reitler,
President."

On May 4, 1921, the defendant replied to the plaintiff's letter of May 2, 1921, as follows:

"Great Western Smelting & Refining Company,
41st & Wallace Sts. & Lake Ave.,
Chicago, Illinois.

Gentlemen:
Answering yours of the 2nd inst., with regards to the order you hold for Red Ingot Brass for us. As soon as business picks up we will take this material. At the present time our foundry is shut down.
Yours very truly,
O'Malley-Beare Valve Company,
Superintendent."

On June 10, 1921, the plaintiff wrote to the defendant as follows:

"O'Malley-Beare Valve Co.,
231-250 East 95th St.,
Chicago, Ills.

Gentlemen:

We are again calling to your attention the matter of the Red Ingot Brass that we owe you, and should like very much to make delivery during the current month, if you could possibly use the material. We would appreciate hearing from you at your early convenience.

Respectfully yours,
Great Western Smelting & Refining Co.,
Ivan Reitler,
President."

In response to the plaintiff's letter of June 10, 1921, the defendant replied as follows on June 16, 1921:

"Great Western Smelting & Refining Company,
41st & Wallace Sts. & Lowe Ave.,
Chicago, Illinois

Gentlemen:

In response to yours of the 10th inst. with reference to the Red Ingot Brass that you still owe us, will say that we have not had a fire in our foundry for over two and one-half months and we cannot say when business will open sufficiently to authorize you to make this shipment.

We suggest that if you have an opportunity to dispose of this metal at any time before we need it, that you do so. Otherwise we shall order the material when we are in a position to make use of it.

Yours very truly,
O'Malley-Beare Valve Company,
Superintendent."

On August 18, 1921, the defendant wrote the following letter to the plaintiff asking the plaintiff to cancel the undelivered portion of the order:

"Great Western Smelting & Refining Company,
600 West 41st St.,
Chicago, Illinois.

Gentlemen:
Attention:Mr. Collin.

Referring to our order No. 3389 of November 6, 1920, upon which there remains an unfilled portion of the 85-5-5-5 which order specifies 'To be delivered as requested.'

Acting under instructions from our Board of Directors, will you kindly arrange for cancellation of undelivered portion of this order as well as all other orders you may have on hand from us at this time? This action is

necessary by reason of changes in specifications for which we had figured the use of this ingot and to cancellations.

This order also covered a quantity of 80-10-10 which has been delivered, and by referring to subsequent orders received from us, you will find where we purchased from you all of our additional 80-10-10 to the extent of about 25,000 lbs. necessitated by changes in specifications, which leaves only a small balance of tonnage.

Yours very truly,
O'Malley-Beare Valve Company,
Thomas O'Malley,
First Vice-President."

To the defendant's letter of August 18, 1921, the plaintiff on August 22, 1921, responded as follows:

O'Malley-Beare Valve Co.,
Railway Exchange Building,
Chicago, Illinois.

Gentlemen:

We beg to acknowledge receipt of your favor of the 18th inst. in reference to unfilled balance on your order No. 3389, and regret very much that we do not see our way clear to comply with your request for cancellation.

We accepted this business from you in good faith and would have delivered all the metal promptly you called for it, regardless of market conditions.

Because the market has declined, we feel that you should also stand by your end of the contract and accept deliveries.

Subsequent orders that you may have placed with us for 80-10-10 metal have no reference whatever to this order. You will find that such subsequent orders were placed at the market prices, and that without having any effect on this order whatsoever.

We feel that you have a definite obligation to take this metal from us, and to take it as quickly as you can use the metal, and before you buy elsewhere, and feel that you will undoubtedly agree with us if you think the matter over; and we should like to have a further expression from you on the subject.

Respectfully yours,
Great Western Smelting & Refining Co.,
Ivan Reitler,
President."

On August 23, 1921, the defendant replied to the plaintiff's letter of August 22, 1921, as follows:

"Great Western Smelting & Refining Co.,
600 West 41st St.,
Chicago, Illinois.

Gentlemen:
Attention: Mr. Ivan Reitler, Pres.

Referring to your letter of August 22nd, and

in reply wish to advise that my letter of August 18th covers the situation fully and to which you seem to have given no consideration.

I have nothing further to add except that you are hereby notified to cancel all orders, as well as any portion of any orders that you may have on hand, which have not been delivered to us.

Yours truly,
O'Malley-Beare Valve Company,
Thomas O'Malley,
First Vice President."

On August 24, 1921, the plaintiff wrote to the defendant as follows:

"O'Malley-Beare Valve Co.,
Railway Exchange,
Chicago, Ills.

Gentlemen:

We have yours of the 23rd inst. addressed for the attention of our President, Mr. Reitler, and your notification to cancel all orders is therefore not accepted by us, and we wish you to understand same accordingly.

Any further communication on this subject will have to be delayed until Mr. Reitler's return early next week.

Respectfully yours,
Great Western Smelting & Refining Co.,
Z. Lippe, Secretary."

On August 29, 1921, the plaintiff again wrote the defendant as follows:

"O'Malley-Beare Valve Co.,
Railway Exchange,
Chicago, Ills.

Gentlemen:

Your letter of the 23rd inst. has been referred to the writer, and I beg to repeat statement made in my letter of August 22nd, that we did not see our way clear to cancel your order.

I have no doubt that your Directors, who evidently have taken the action, rather than any individual, have some very good reason for doing so, and some reason that will satisfy us.

I accordingly would appreciate very much if Mr. O'Malley would take the trouble to call on me and explain this reason. I shall expect you to do this promptly, as you will readily understand that this matter should be cleared up.

Respectfully yours,
Great Western Smelting & Refining Co.,
Ivan Reitler,
President."

On September 6, 1921, the plaintiff wrote the defendant the following letter:

"O'Malley-Beare Valve Mfg. Co.,
Railway Exchange,
Chicago, Ills.

Gentlemen:

We have had no reply to our letter of the 29th inst. in reference to Ingot Brass due you, and should like to have you indicate if Mr. O'Malley intends to call on the writer in this connection, or not.

Respectfully yours,
Great Western Smelting & Refining Co.,
Ivan Reitler,
President."

After this letter of September 6, 1921, the correspondence between the plaintiff and the defendant apparently ceased.

The principal assignment of error of the defendant is that the court erred in instructing the jury to find a verdict against the defendant; that the questions whether the plaintiff offered or tendered performance on its part within a reasonable time or whether the plaintiff actually offered to deliver the remainder of the ingots to the defendant within a reasonable time were questions for the jury to determine.

In our opinion, in view of the fact that the defendant refused to perform the contract and expressly cancelled the contract by its letter of August 18, 1921, we do not think that there were any such questions for the jury to determine.

It will be observed that in the letter of August 18, 1921, the defendant did not cancel the contract because of any failure on the part of the plaintiff in regard to a tender of performance of the contract within a reasonable time. The cancellation was based on the ground that it was "necessary by reason of changes in specifications for which we had figured the use of this ingot and to cancellations." Furthermore the suit of the plaintiff is not brought for an alleged breach on the part of the defendant to perform the contract within a reasonable time. The suit is based on the defendant's breach of the contract by refusing to perform the contract, and by cancelling the contract.

It is the rule, as announced in the case of Chamber of

Commerce of the City of Chicago v. Sellitt, 43 Ill. 519, 523, that "If one party to an executory contract induces the other to believe that he had withdrawn from the contract, the other contracting party need not wait until the day of performance before making new arrangements, nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency." To the same effect is the case of Fox v. Hitton, 19 Ill. 518, 533. It is also the rule that "a party having a right to insist upon a condition precedent to the payment of money or other performance on his part, will waive the condition precedent by a total denial of liability or by placing his refusal to perform on other grounds." Lehr Bottling Co. v. Ferguson, 223 Ill. 88, 93.

Counsel for the defendant further contend that there "was not a scintilla of evidence as to the value of the ingots in question at Hackett Spur, Burnside, Cook County, Illinois, the place of delivery specified in the order." In answer to this contention counsel for the plaintiff assert that there was proof of the market price of the ingots in Chicago; that there was also proof that Hackett Spur was at the corner of 95th Street and South Park Avenue; that the court will take judicial notice that 95th Street and South Park Avenue is in Chicago; that therefore proof of the market price in Chicago was proof of the market price at Hackett Spur.

We do not find any direct evidence of the market price of ingots in Chicago. Witnesses who were in the metal business in Chicago, testified as to the market price of ingots, but they did not testify expressly as to the market price in Chicago. They merely testified generally as to the usual and customary price. However, we do not think that on the record there is any dispute on the question as to whether or not the market price which was proved related to Hackett Spur, Burnside. It seems

Immediate.

to be assumed by both parties that the market price which was testified to was the market price at Hackett Spur, Burnside. In the plaintiff's statement of claim, the plaintiff states that the ingots were to be delivered F. O. B. Hackett Spur, Burnside, Cook County, Illinois, and to be shipped to 255 East 95th Street, Chicago, Illinois; that the current market price of the ingots on or about August 18, 1921, was 10 cents per pound and that the difference between the contract price and the current market price was 4 cents per pound. The affidavit of merits of the defendant alleges that the current market price of the ingots on or about August 18, 1921, was not 10 cents per pound, but was .1272 cents per pound. The affidavit of merits does not deny that the ingots were to be delivered at Hackett Spur, Burnside. The pleadings, therefore, assume that the market price of the ingots referred to the market price at Hackett Spur, Burnside. Furthermore, on the trial, neither the witnesses for the plaintiff nor the witnesses for the defendant testified as to the market price of the ingots at any specific place. They merely testified generally as to the market price.

Counsel for the defendant assign errors on certain rulings of the trial court relating to the evidence. The evidence in this respect was unimportant and immaterial, and we do not think that any reversible error was committed by the court.

For the reasons stated we are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

198 - 29614

94432

JOHN HANSON, Doing Business as JOHN HANSON & CO., Appellee,	)	APPEAL FROM MUNICIPAL COURT
vs.	)	OF CHICAGO.
ANNA BEHRENS, Appellant.	)	237 I.A. 653

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Anna Behrens, from a judgment in the Municipal court of Chicago, on a finding of the court in the sum of $351.62 in favor of the plaintiff, John Hanson, doing business as John Hanson & Co., in an action brought by the plaintiff on a written guaranty signed by the defendant. The guaranty is as follows:

"Oct. 17, 1922.
This is to certify that I hereby agree to guarantee payment of Merchandise bought by Mr. A. G. Pickell (My son-in-law) of 4309 Greenview Ave.
(Signed) Anna Behrens."

Counsel for the defendant contends that the statement of claim does not state a cause of action. The statement of claim is as follows:

"Plaintiff alleges: That on the 17th day of October, 1922, one A. G. Pickell was indebted to the plaintiff in the sum of Three Hundred Seventy-four Dollars and Fourteen Cents ($374.14) for goods sold and delivered, an itemized statement of such account showing the date of sale, goods purchased, and price to be paid therefor, is hereto attached marked 'Exhibit A' and made a part of this statement of claim; That the plaintiff refused to extend further credit to the said A. G. Pickell unless he gave the plaintiff a written guarantee from the defendant guaranteeing payment of the account for goods already sold and guaranteeing the payment for goods to be thereafter sold, and, thereupon the defendant in consideration of the plaintiff extending further credit to said A. G. Pickell entered into a written guarantee, guaranteeing all goods then sold and not paid for and all goods sold to the said A. G. Pickell thereafter, which said guarantee is in words and figures as follows:
'Oct. 17th, 1922.
This is to certify that I hereby agree to guarantee payment for merchandise bought by Mr. A. G. Pickell (My son in law) of 4309 Greenview Ave.
(Signed) Anna Behrens.'
That an itemized statement of the goods sold to said A. G.

Pickell since October 17, 1922, is hereto attached as 'Exhibit B' and made a part of this statement of claim; That the amount of goods sold since the 17th day of October, 1922, amounts to One Hundred Forty-five Dollars and Ninety-eight Cents ($145.98). That the said A. G. Pickell is entitled to a credit for money paid, the sum of One Hundred Sixty-five ($165.00) and Three Dollars and Fifty Cents ($3.50) for goods returned. That there is due under said guarantee for goods sold and delivered the said A. G. Pickell after allowing him all deductions and set-offs the sum of Three Hundred Fifty-one Dollars and Sixty-two Cents ($351.62), for which amount this defendant is liable under her guarantee above set forth."

We are of the opinion that the statement of claim states a cause of action.

It is further contended by counsel for the defendant that the guaranty was intended to cover only "a certain purchase made the day of its date." We do not think that reasonably construed the guaranty admits of that construction. According to a fair interpretation, the guaranty was intended to cover a pre-existing debt and was not limited to a particular purchase on the day the guaranty was signed.

Counsel for the defendant further contends that "there was a total failure of proof of the material allegations of plaintiff's cause of action." Counsel does not indicate, wherein the proof is insufficient. A general statement of this character, without specifying in what particular there is a failure of proof, is inadequate to present the question for review. C. & A. R. R. Co. v. Strawboard Co., 190 Ill., 268, 274, 275; Halek v. American Car & Foundry Co., 155 Ill. App. 261, 262.

Counsel for the defendant contends that "the guarantor was entitled to reasonable notice of default on the part of the principal debtor."

It is the rule that the right to notice is not an absolute right in the sense that the failure to give it will in all cases and under all circumstances release the guarantor. The right

to notice is a relative right, and the failure to give notice can only be availed of when it is made to appear that the guarantor has suffered loss by such failure. Mamarow v. National Lead Company, 308 Ill., 626, 636.

In the case at bar there is no proof that the defendant suffered any loss by reason of the failure of the plaintiff to give her notice of the default of the principal debtor.

We think that the judgment of the trial court should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

29624

207 - 29624

J. KOVEN and BORIS KOVEN,
Trading as J. KOVEN & CO.,
Appellees,

vs.

SUPERIOR CRIB & NOVELTY
COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 653

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the Superior Crib & Novelty Company, from an order of the Municipal court of Chicago denying the motion of the defendant to vacate a judgment entered by default against the defendant in the sum of $986.15.

The first contention of counsel for the defendant is that the service of summons on the defendant was invalid and that therefore the court was without jurisdiction. The return of the bailiff as to the service of the summons is as follows:

> "Served this writ on the within named Superior Crib & Novelty Co., a corporation, by delivering a copy thereof with a Praecipe and statement of claim and affidavit attached thereto on R. Marcus, agt. of said corporation, and at the same time informing him of the contents thereof in the City of Chicago this 15th day of Aug. 1924.
> The President, Clerk, Secretary, Superintendent, General Agent, Cashier, Principal Director, Engineer, Conductor or any other Agent of said corporation not found in the City of Chicago."

Counsel for the defendant maintain that the return of the bailiff is fatally defective because it recites that the President could not be found "in the City of Chicago" instead of stating, as provided by section 8 of the Practice act, chapter 110, that he could not be found "in the County." Counsel for the defendant cite the case of The Chicago Planing Mill Company v. The Merchants' National Bank, 57 Ill. 587, which holds (p. 589), in regard to a summons in an action in the Superior court, that the

return must show that the president of the corporation was not found in the county.

It has been held, however, that the rule is different in respect of the service in an action in the Municipal court. Burr v. Co-operative Construction Co., 162 Ill. App. 512. In this case the court said (p. 520):

> "A careful consideration of the matter leaves us of the opinion that in view of the localized jurisdiction of the Municipal court of Chicago and the provision in section 48 of the Municipal Court Act, that 'the practice and proceedings *** in cases of attachment *** included within the cases of the fourth class *** shall be the same as near as may be, as that which is now prescribed by law for similar cases in other courts of record ***;' the return of service on the 'treasurer and agent' is sufficient on the further showing that the president is not found within the City of Chicago, the limits of which measure the extent of the jurisdiction of the court and of the authority of its officer."

This court has similarly held in the recent case of Madison & Kedzie State Bank v. Old Reliable Motor Truck Co., Gen. No. 29427, not yet reported.

We are of the opinion that the service was valid and that, therefore, the court had jurisdiction of the defendant.

Counsel for the defendant further contend that the defendant has shown due diligence in the application for the motion to vacate the judgment, and that the affidavit in support of the motion sets up a meritorious defense.

There can be no dispute on the question of diligence, as the motion to vacate the judgment was entered two days after the judgment was entered.

In regard to the question of a meritorious defense, we are of the opinion that the averments of the affidavit sufficiently state a meritorious defense.

The plaintiffs' statement of claim alleged that the plaintiffs furnished and delivered to the defendant certain printing work and material as follows: "Stationery, letterheads;

25000 catalogues, 25,000 envelopes, 25,000 order blanks, 15,000 letterheads in multigraph form and insertion of catalogues, price lists and letters in envelopes; envelopes; 5,000 factory forms in duplicate."

The affidavit of the defendant in support of the motion to vacate the judgment alleged, in substance, that about June 17, 1924, Adolph Roth and Frank Bigelow acquired all the capital stock of the defendant and became officers of the corporation; that the first notice they had of the judgment was when the bailiff came to their place of business to serve the execution; that at the time that the corporation was taken over by Roth and Bigelow the books of the company did not show any indebtedness to the plaintiff "for or on account of the catalogues, envelopes, letterheads in multigraph form and insertion of catalogues, price lists, letterheads and envelopes as mentioned in the statement of claim filed in this suit or for any part thereof, and that while affiant saw some catalogues in the place of business of the said defendant, upon inquiring from the former stockholders about them he was informed that the printers acknowledged mistakes in the printing of them, and that they were sending for them to take them back, and that there was nothing owed on account thereof; and that no part of the catalogues, letterheads in multigraph form and insertion of catalogues, price lists, letterheads and envelopes have or had ever been used by the defendant; and that over half of the quantity referred to in said item of plaintiffs' statement of claim were never delivered to the defendant, and to the best of affiant's information and belief never either printed or prepared for because of the fact that upon the delivery of the first quantities of said item, it was discovered by the former owner of the above named defendant that there were many errors in the printed

matter and in the arrangement and location of cuts as shown in said catalogues, all of which had been called to the attention of, the fact acknowledged by the plaintiffs as their mistake, which they promised to rectify, and held up the balance of the order for the purpose of rectifying said mistakes; that said mistakes have never been rectified, and that all of the said catalogues, envelopes, order blanks, letterheads in multigraph form with the envelopes of the same with the price lists and letters and envelopes are useless and of no value to the defendant; and that this defendant is justly indebted, ready, able and willing to pay, and for that purpose brings into court the money with which to pay all other items in plaintiff's statement of claim."

In our opinion the trial court erred in not granting the motion of the defendant to vacate the judgment.

In the case of McMurray v. Peabody Coal Co., 231 Ill. 218, the court said (p. 226):

> "It has been the long and well established practice in this State for courts to be liberal in setting aside defaults at the term at which they are entered, where it appears that justice will be promoted thereby."

The judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

231 - 29648

444

BENJAMIN SULLIVAN,
Appellee,

vs.

CHARLES ROSS AND COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 653

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Ross and Company, the defendant, from a judgment in favor of the plaintiff in an action of forcible detainer brought by the plaintiff in the Municipal court of Chicago.

The claim of the plaintiff is that the defendant is a tenant under a written lease and that the defendant has defaulted in the payment of rent.

The defendant contends that the lease is invalid; that the tenancy was from month to month, and that the defendant was therefore entitled to the statutory notice of five days; that such notice was not given. It is contended by counsel for the defendant that the lease was invalid because it was originally made to Charles Ross and was not properly assigned by him to the defendant, Charles Ross and Company. The assignment and consent of the plaintiff to the assignment are as follows:

"ASSIGNMENT AND ACCEPTANCE.

For value received I hereby assign all my right, title and interest in and to the within Lease unto Charles Ross & Company, its successors, heirs and assigns, and in consideration of the consent to this assignment by the Lessor, I guarantee the performance by said Charles Ross & Company of all the covenants on the part of the second party in said Lease mentioned.

In consideration of the above assignment and the within consent of the party of the first part thereto, we hereby assume and agree to make all the payments and perform all the covenants and conditions of the within Lease, by said party of the second part to be made and performed.

WITNESS our hand and seal this 18th day of October A.D.1920.

Chas. Ross & Company (SEAL)
By Chas. Ross (SEAL)
President.

CONSENT TO ASSIGNMENT.

The undersigned party of the first part hereby consents to the assignment of the within Lease to Charles Ross & Company, on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as therein mentioned, and that no further assignment of said Lease or subletting of the premises or any part thereof shall be made without his written assent first had thereto.

Witness my hand and seal 10th day of October, A.D. 1922.

Benjamin Sullivan (SEAL)."

We are of the opinion that although Charles Ross did not sign the assignment individually, nevertheless Charles Ross and Company did, and expressly agreed as follows:

"In consideration of the above assignment and the within consent of the party of the first part thereto, we hereby assume and agree to make all the payments and perform all the covenants and conditions of the within Lease, by said party of the second part to be made and performed."

Furthermore, the plaintiff accepted Charles Ross and Company as lessee, and Charles Ross and Company paid rent to the plaintiff under the lease.

We are of the opinion that Charles Ross and Company was a tenant under the lease and that, therefore, the defendant was not entitled to the statutory notice of five days.

Counsel for the defendant further contend that the defendant had the right to a set-off or counter-claim for an amount alleged to be due to the defendant from the plaintiff for repairs made by the defendant on the plaintiff's automobile.

It has been held that no cross demand in the nature of a recoupment can be interposed by way of defense in an action of forcible detainer. Geiger et al. v. Brown, 167 Ill. App. 535, 536; Mark v. Schumann Piano Co., 105 Ill. App. 490, 493.

Moreover, the testimony of Charles Ross on behalf of the defendant shows that there was never any conversation between him and the plaintiff with reference to applying the alleged indebtedness for repairs on the rent. The plaintiff also testified that it was never agreed between Ross and himself that the money

due to Rose from the plaintiff for repairs was to apply on the rent of the defendant.

Counsel for the defendant contend further that the plaintiff could not terminate the lease without notice and demand as to the defendant.

Counsel for the defendant apparently have overlooked the provision in the lease in which the lessee waives all right to notice of de and. The provision is as follows:

> "Said Lessee hereby expressly waiving all right to any notice or demand under any statute in this State, relating to forcible entry and detainer or landlord and tenant and agrees that the Lessor, his agents or assigns may begin suit for possession or rent without notice or demand. And notice of election to terminate this lease, or notice of any election hereunder, is hereby expressly waived."

We are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

240 - 29657

THERESA WEISSE,
Appellee,

vs.

MARY FITZGERALD et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 653

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, Mary Fitzgerald and Anna Fitzgerald, from a decree of foreclosure in a suit brought by the complainant, Theresa Weisse, as the holder of a note and trust deed executed by the defendants.

The defendants ask for a reversal of the decree on two grounds: First, that the chancellor erred in finding that interest was due on the note from December 8, 1919; Second, that the chancellor erred in finding that the complainant was the legal holder of the note and trust deed.

Counsel for the defendants states that the testimony of the complainant herself shows that interest was paid in February, 1920. We do not agree with counsel. The testimony of the complainant does not show that interest was paid in February, 1920. The testimony of the complainant, on direct examination, in respect of interest is as follows:

"Q. Now, Mrs. Weisse, when was the last payment of the interest received?
A. February, 1920, I can't say what date because I was-----
Q. How much?
A. Thirty dollars.
Q. Has any sum been received by you since that date?
A. Not a cent."

On cross-examination the complainant was not questioned about the interest. On re-direct examination the complainant testified as follows:

"The Master: How many times did Mr. Fitzgerald pay you interest?
A. It was in June, ever since Graham went bankrupt.

Q. When was that?
A. That was the 29th June, 1917.
Q. And Mrs. Fitzgerald has paid you the interest every six months since then?
A. She paid me in December, shortly before Christmas, she paid the interest.
Q. Has she paid you interest since 1917 to 1920?
A. Yes. Every time $30."

It will be observed that on direct examination immediately after the complainant said February, 1920, she added, "I can't say what date;" that on re-direct examination she testified that the interest was paid "in December shortly before Christmas," and the interest was paid from 1917 to 1920.

The defendants offered no evidence in regard to the payment of interest.

We do not think that on a fair interpretation of the testimony of the complainant it can be said that interest was paid in February, 1920. In our view of the testimony the last payment of interest was made in December, 1919, shortly before Christmas.

In regard to the question whether the complainant was the legal holder of the note and trust deed, counsel for the defendant maintains that "the testimony of the complainant herself, on cross-examination shows conclusively that her husband bought the note in question at the Graham Bank, paid for it by check signed by him (the husband) and that the husband handed the check to the Graham bank official, who thereupon delivered the note to the husband; that her husband then handed the note to complainant (the wife) and said to her, 'take care of that.'"

Counsel for the defendant adds, "This is all the evidence upon the question of the ownership of the note." It is not, however, all of the evidence in regard to the ownership of the note. On direct examination the testimony of the complainant was as follows:

"Q. Mrs. Weisse, who is the owner now of the note and trust deed?
A. My husband and I."

No objection on behalf of the defendants was made to the answer of the complainant and no motion was made to strike out the answer. The following question was then asked the complainant:

"Q. Who is the owner now of this trust deed?
A. I got this note when we paid it before the trustee in Graham's; on that day I took it right away and put it in deposit box."

On behalf of the defendants the following objection was made: "Object to that as being a conclusion. Let the witness state how she got it; and as to whether she is the owner or not is the question now in issue." The solicitor for the complainant said, "Well, I am asking who owns it." The solicitor for the defendants replied, "That is the question I object to." The master stated, "Objection sustained."

The complainant then continued her testimony as follows:

> "At the time I got this note I put it in deposit box in my husband's and my name, and we paid it from that day I had it. We paid $1000 to Graham and Graham paid up the interest until it closed and then we had to see about the interest, they don't get the interest."

No evidence was offered by the defendants on the question of the ownership of the note and trust deed.

In this state of the record we are of the opinion that the testimony of the complainant shows at least <u>prima facie</u> that the complainant was the owner of the note. Furthermore, we are of this opinion irrespective of the testimony of the complainant, which was admitted without objection, that she was the owner of the note; and also irrespective of the question whether or not the court correctly ruled on the objections to subsequent questions as to ownership that it was not permissible under the rules of evidence for the complainant to testify directly in regard to her ownership of the note and trust deed. The evidence shows that

the complainant was in possession of the note. The rule is well settled that ownership is presumed from possession of a note. Henderson v. Davidson, 157 Ill. 379, 381; Ramson v. Jones, 9 Ill. (1 Gasm.) 291, 293; Brunnell v. Dixon, 37 Ill. 197, 205; The Evangelical Lutheran St. S. Cong. v. Bishop, 213 Ill. App. 137, 143; Puplan v. Savage, 196 Ill. App. 378, 383; Spring v. Winterbotham, 96 Ill. App. 123, 124. In the case at bar this presumption was not rebutted.

Since we are of the opinion that the complainant was the legal holder of the note, it follows that she was legally entitled to bring suit to foreclose the trust deed. Horn v. Colt, 180 Ill. 397, 398; Cheltenham Improvement Co. v. Whitehead, 158 Ill. 279, 285, 286.

The decree of the chancellor is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

340 - 29757

MAX GOODMAN,
Appellant,

vs.

JACK ROPEYKA,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 654

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought by Max Goodman, the plaintiff, against Jack Lopeyka, the defendant.

By a written lease the defendant acquired possession of premises owned by the plaintiff.

The lease contained the following provision in regard to an option for the purchase of the premises:

> "Lessee is hereby given the option of purchasing the premises hereinbefore described at a price not more than $60,000.00 subject to existing mortgages; said option to be exercised within the first two years of this lease."

On the trial of the case the following stipulation was entered into between the parties:

> "It is agreed that prior to the expiration of the two year period provided for in the lease, the defendant notified the plaintiff and his attorneys of his election to exercise the option and that pursuant to an appointment made by the parties they met in the office of the attorney for the plaintiff for the purpose of consummating the option which the defendant had elected to exercise."

The ultimate question presented for decision is whether the defendant occupied the premises as a tenant or as a purchaser in possession under the option. And the determination of this question depends on the question whether the defendant complied with all of the legal requirements necessary to entitle him to a deed.

The option was not consummated, but the defendant contends that he has complied with all the legal requirements necessary under the option to entitle him to a deed, and that the

plaintiff has refused to give him the deed. The defendant maintains that the plaintiff has not complied with the terms of the option and is not entitled to a deed.

The evidence shows that the parties, accompanied by their attorneys, met in the office of the attorney for the plaintiff for the purpose of consummating the option. The plaintiff was represented by his attorney, B. E. Cohen, and the defendant was represented by his attorney, S. B. Blanksten. At this meeting Cohen stated that he had the necessary funds and was ready to close the deal; that the interest on the mortgage should be pro-rated; that the taxes for the year 1923 should also be pro-rated; that the deed from Max Goodman should be signed by Goodman's wife. Blankstan offered Cohen a deed from Goodman not signed by Goodman's wife, and Cohen refused to accept the deed. The meeting terminated without an agreement having been reached by the parties. When Blankstan offered Cohen the deed to the premises and Cohen refused to accept it, Cohen said to the defendant, "Let's go, Jack, and don't pay any rent."

It is contended by the defendant that all of the demands made by Cohen were legal demands, and that the defendant was not required to do anything further.

As the defendant is holding the plaintiff to a strict performance of the plaintiff's obligations, the defendant on his part should strictly comply with all the requirements which the law imposes on him.

In our opinion the defendant has not discharged all of the obligations that were essential before he could demand a deed from the plaintiff. An actual tender by the defendant of the purchase money or the specific amount agreed upon as a cash payment, should have been made by the defendant. The evidence does not show that such a tender was made.

Cohen testified that at the meeting of the parties he told Blankstan that they were ready to close the deal and "had the necessary funds."

Blankstan, on behalf of the plaintiff, testified that Cohen did not say that he had the money to close the deal; that neither did Kopeyka say that; that no money was offered or shown by either Cohen or Kopeyka.

Assuming that Cohen's testimony is correct, no legal tender was made by the defendant.

The rule as stated in Wynkoop v. Cowing et al., 21 Ill., 570, 587, 588, is that "A tender is stricti juris ** and the money must be in sight, and capable of immediate delivery." This is in accordance with the general rule. 26 R.C.L., section 1, p. 622; Section 5, pp. 626, 627; 38 Cyc, pp. 131, 132.

We are of the opinion that the judgment of the trial court should be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

349 - 29766

JAMES F. STEFINA et al., appellees, vs. CHARLES P. R. MACAULAY et al., Defendants. CHARLES P. R. MACAULAY, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY. 237 I.A. 654

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles P. R. Macaulay, the defendant, from an order of the chancellor of the Superior court of Cook county approving and confirming the report of a Master in Chancery of a sale of certain real estate sold by the Master pursuant to a decree of the Superior court.

The only question presented for decision is whether the Chicago Law Bulletin, the newspaper in which the notice of sale was published, is a secular newspaper of general circulation, published in the City of Chicago.

The only testimony in the case is that of the defendant himself. His testimony is as follows:

"The three copies of the Chicago Daily Law Bulletin introduced in evidence are copies issued by the Bulletin and are similar in character of issues of other dates.

Mr. Wyman: I object.

The Court: The court cannot be controlled by your conclusions.

Mr. Macaulay: I have subscribed for the Chicago Daily Law Bulletin for some years and am familiar with the character of its publications, the nature of the news it contains - it is not a newspaper of general circulation, does not contain and it does not ordinarily contain---

Mr. Wyman: I object to that.

The Court: Objection sustained.

Mr. Macaulay: This paper does not contain matter regularly published by secular newspapers of general circulation, or any news of general events of public interest.

Mr. Wyman: I object.

The Court: I don't see how such evidence is remotely competent, but I don't wish to preclude either of you from

presenting any evidence which you may wish the Appellate court to consider. Go as far as you like.

Mr. Macaulay: It is my recollection that the Chicago Daily Law Bulletin did not and does not contain the results of elections of important public officials of the government, reports of great battles during the war, sporting news, or any news of general interest to the public. I did not know of the sale and had no notice of it. I did not attend the sale and I believe that if the sale had been properly advertised, or advertised according to law, the amount bid would have been larger than was bid in this case."

The Master stated in his report that the Chicago Daily Law Bulletin was a secular newspaper printed and published daily in the City of Chicago, County of Cook and State of Illinois, and of general circulation throughout the County and State.

In the case of Railton v. Lander, 126 Ill. 219, 221, it was expressly held by the Supreme Court that the Chicago Daily Law Bulletin was "a secular newspaper of general circulation within the meaning of the statute."

In our opinion we would not be justified on the indefinite, unsatisfactory evidence of the defendant in holding that the character of the Chicago Daily Law Bulletin has materially changed from what it was at the time of the decision in the case of Railton v. Lander, supra. The chancellor properly sustained objections to the part of the testimony of the defendant consisting of mere general conclusions. The remaining part of the defendant's testimony does not contain a positive statement of existing facts. It is a narration of what the defendant "recollects" the Chicago Daily Law Bulletin published in the past, and what he "recollects" it publishes now. The publication of the Chicago Daily Law Bulletin is a continuing act, not a past event. The character of the paper would be determined by what it publishes at the present time. The part of the testimony of the defendant which purports to be based on a recollection of an existing practice or state of facts in regard to the publication of

the paper, is illogical and does not affirm that there is such an existing practice or state of facts.

The order of the chancellor is affirmed.

AFFIRMED.

McGurely, P. J., and Hatchett, J., concur.

29781

364 - 29781

4442

HARPER & KIRSCHTEN SHOE CO.,
a Corporation,
Appellee,

vs.

HARRY BOWS and MILDRED KARPEN BOWS.
On Appeal By MILDRED KARPEN BOWS,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 654

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Harper & Kirschten Shoe Company, the plaintiff, in the Municipal court of Chicago, on five promissory notes executed by the defendants.

On motion of the plaintiff the affidavit of merits was ordered by the court to be stricken from the files. The defendants elected to stand by the affidavit of merits and prosecuted this appeal from the judgment of the court.

The only question to be determined is whether the affidavit of merits is sufficient. The affidavit of merits is as follows:

> "That the defendant, Mildred Karpen Bows, did not at any time purchase any merchandise from the plaintiff, nor receive any money from the said plaintiff, nor was she at any time indebted to the plaintiff, and that she did not receive any consideration of any nature or description for the signing of the several notes in question, nor did she sign the same as an accommodation paper. Therefore, this affiant alleges that the said defendants are not indebted to the plaintiff in any amount."

It will be observed that the defendant, Harry Bows, did not join with the defendant Mildred Karpen Bows in the allegations in the affidavit of merits. The precise question is whether the defenses pleaded in the affidavot of merits by Mildred Karpen Bows alone, as one of two joint makers of the notes, is sufficient.

We do not think that the affidavit of merits is sufficient. Many Blanc & Co. v. Krueger, 153 Ill. App. 327. In that

case a note was executed jointly by Eugene Krueger and Sophia Krueger, husband and wife. Sophia Kreuger filed certain pleas but did not file the plea of want of consideration. The court instructed the jury in part as follows:

> "The court instructs you that if you believe from the evidence that the note in question was not taken by the plaintiff in satisfaction of the indebtedness due to the plaintiff from the defendant, Eugene Krueger, or that it was not taken as security as such for the same, then you are instructed as a matter of law that there was no consideration moving from the plaintiff to the defendant, Sophia Krueger, for the signing of said note, and unless you further find from the evidence that the plaintiff has altered his position and has been damaged thereby, you will find the issues on this point for the defendant, Sophia Krueger."

The court held (p. 329) that in the absence of a plea of want of consideration by Sophia Krueger, evidence of want of consideration was inadmissible; and the court further held (p.329) that under the facts proved such a plea, even if pleaded, could not have been sustained. The court said (pp. 329, 330):

> "It remains therefore to determine whether the defense of want of consideration is maintainable by one executing a demand note jointly with a debtor, for the latter's accommodation, payable to a creditor on a matured claim and delivered to him as collateral security for his claim, when the creditor has knowledge of all the facts and has given no new consideration either to the debtor or to his co-maker. It was the settled law in most jurisdictions before the enactment of the uniform Negotiable Instruments Act and it is clearly the law under section 25 of the act, as adopted in Illinois, the language of which differs from the language adopted in the corresponding section in other states, under which some conflict in the authorities has arisen (Brannan Neg. Ins. Law, p. 207) that 'a pre-existing debt constitutes value where an instrument is taken as security therefor whether the instrument is payable on demand or at a future time. Moreover, not only the endorsee but even the payee of an instrument may be a holder in due course. Boston Steel & Iron Co. v. Steuer, 183 Mass. 140; Lloyd's Bank v. Cooke, 1907, 1 K. B. 794, at 805, 809. Both prior to the Negotiable Instruments Act of 1907, (Graef v. Potter, 226 Ill. 628) and by the express provisions of section 29 of the act an accommodation party is not relieved of liability because the holder knew him to be only an accommodation party. In giving the note to plaintiff there was no violation of any restrictions placed upon its use. Therefore the defense of want of consideration even if properly pleaded could not have availed the defendant in this case. Harrell v. Tennant, 30 Ark. 654."

In their reply brief counsel for the defendants contend for the first time that the plaintiff's statement of claim does not state a cause of action. Under the rules of this court it is

not permissible to raise a new point in the reply brief. Furthermore, counsel for the defendants expressly state in their original brief that "the sole question in the case is the sufficiency of appellant's affidavit of merits as a defense to the action."

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

29809

392 - 29809

445

MOTOR CAR SECURITIES CORPORATION,
a Corporation,
Appellee,

vs.

JOHN BAGDONAS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 654

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by John Bagdonas, the defendant, from a judgment on a finding of the court that the defendant maliciously, wilfully and intentionally, with intention to defraud the Motor Car Securities Corporation, the plaintiff, converted to the defendant's own use an automobile of the plaintiff. The court assessed the plaintiff's damages at the sum of $750, which the proof showed was the value of the automobile.

The defendant was engaged in the garage business and was the owner of a Case automobile. Being desirous of selling the automobile he employed an automobile dealer by the name of Charles Monheimer to sell the automobile. Monheimer had sold automobiles for the defendant before. Monheimer put the automobile in question in his showroom and exhibited it there for several weeks. Monheimer sold the automobile to a woman named Hazel Epstein. In payment of the purchase price for the automobile, Hazel Epstein traded in to Monheimer a second hand Mercer automobile, gave her note for $583.40, payable to herself and endorsed by her, and executed a chattel mortgage upon the Case automobile to secure her note. The chattel mortgage provided that the note was to be paid in ten monthly installments of $58.34 each. The plaintiff purchased the note and mortgage from Monheimer for about $500. Monheimer paid the defendant $300 on account of the sale of

the car. Hazel Epstein paid three installments on the note, defaulted on the fourth installment, and has paid nothing since. A dispute about the sale of the car arose between the defendant and Monheimer. In an action of replevin brought by the defendant against Monheimer for the automobile, the defendant obtained a judgment against Monheimer. The plaintiff was not a party to this action. Subsequently, without any process of law, the defendant took the automobile from "a man named Epstein on Drexel boulevard." The defendant testified that at the time he took the car from Epstein he was accompanied by the "police." The defendant still has the automobile in his possession or in his control. In this respect the defendant testified that he had the automobile; that he would not tell where it is; that his cousin, Mike Roamer, has the automobile; that he, the defendant, does not know where his cousin lives.

Counsel for the defendant contends that the court erred in ruling that the measure of damages was the value of the automobile; that the correct measure of damages was the amount of the unpaid indebtedness on the note; and that the proof of such indebtedness was not properly made by the plaintiff.

A complete answer to these contentions of counsel for the defendant is that in our opinion the court correctly held that the measure of damages was the value of the automobile. From this view it follows that the questions of the amount of the unpaid indebtedness, and the proof in regard to such indebtedness are immaterial.

The rule is that after default by the mortgagor upon a condition in a chattel mortgage, the title to the property becomes vested in the mortgagee, and the mortgagee has the right to take possession of the property. Whittemore v. Fisher, 132 Ill. 243, 256; Simmons v. Jenkins, Admr., 76 Ill. 479, 481; Talty v.

Schoenholz, 224 Ill. App. 158, 161; Alexander v. Meyemberg, 112 Ill. App. 223, 224; Hay v. W. W. Kimball Co., 55 Ill. App. 263, 264, 265; Frankenthal v. Mayer, 54 Ill. App. 160, 162.

It is also the rule that a party having a special interest in chattels may, as against a stranger to the title, recover the full value of the chattels, and that the excess beyond his special interest will be held by him in trust for the general owner. Atkins v. Moore, 82 Ill., 240, 242; Benjamin v. Stromule, 13 Ill. 467, 469; 38 Cyc, pp. 2089, 2090; 28 Am. & Eng. Enc. Law, p. 729.

In the case at bar there was a default upon a condition in the chattel mortgage, and the defendant was a stranger to the title so far as the plaintiff was concerned.

The chattel mortgage provides that if the mortgagee "shall feel insecure or unsafe," the mortgagee may take possession of the automobile. The mortgage also provides that the mortgagor may retain possession of the automobile, but that the mortgagor is not to part with the possession of the automobile.

We are of the opinion that in the circumstances the seizure of the automobile by the defendant justified the plaintiff reasonably in feeling unsafe and insecure and vested the title in the mortgagee and authorized the mortgagee to take possession of the automobile. It has been repeatedly held that under a chattel mortgage which contains a provision that if the mortgagee shall feel himself unsafe or insecure he shall have the right to take possession of the mortgaged property, the mortgagee may take possession of such property in circumstances which reasonably would induce him to feel insecure and unsafe. Hogan v. Akin, 181 Ill. 448, 455; Bailey v. Godfrey, 54 Ill., 507, 511; Aultman v. Silvis, 39 Ill. App., 164, 177.

Counsel for the defendant maintains that the defendant is not a stranger to the title; that the defendant had possession of the automobile, and that "possession is prima facie evidence of ownership and the right to possession." In our opinion the answer to this contention is that in relation to the plaintiff, Hazel Epstein is the general owner of the automobile, not the defendant; that in legal significance the defendant is unknown to the plaintiff and is therefore a stranger.

We have read the case of Bennett v. Gilbert, 94 Ill. App. 505, 515, which counsel for the defendant specially requested us to read and which holds that "the sheriff, as the special owner of the property levied on, by virtue of an execution in his hands, is entitled, as a general rule, to recover the full value of the property replevied, and, as he represents not only the interest of the execution creditors but also that of the general owner of the property, if the proceeds of the judgment exceed the amount due to the execution creditor, it is the sheriff's duty to hold such excess in trust for or pay it to the general owner, or to whomsoever may appear to be entitled thereto."

In view of the fact that we are of the opinion, as heretofore stated, that the defendant, in relation to the plaintiff, is not the general owner of the automobile, but a stranger to the title to the automobile, the case of Bennett v. Gilbert, supra, is not applicable to the question of the measure of damages in the case at bar.

Counsel for the defendant further contends that the plaintiff cannot plead that it is the absolute owner of the automobile and satisfy such plea by proving that it is entitled to the possession of the automobile by virtue of a lien upon it. We have held that the title to the automobile vested in the plaintiff by reason of a default on the conditions in the chattel

mortgage, and that therefore the plaintiff had the right to take possession of the automobile.

It is further contended by counsel for the defendant that the court erred in refusing to admit in evidence the judgment in the replevin suit between the defendant and Monheimer; that "the plaintiff as privy of Monheimer was bound and concluded by any judgment rendered against said Monheimer in reference" to the automobile. As the plaintiff was not a party to the suit, the plaintiff could not be bound by the judgment. Even though there may have been privity between the plaintiff and Monheimer, nevertheless the relation of the defendant to the plaintiff in a legal sense was that of a stranger. It might be argued that Hazel Epstein could set up defenses existing between herself and Monheimer as against the plaintiff, but the defendant does not stand in relation to the plaintiff as Hazel Epstein does.

Counsel for the defendant further maintains that the finding of the court that the defendant was guilty of maliciously, wilfully and intentionally converting the defendant's property to his own use is not sustained by the proof. We think that the finding of the court was justified by the evidence. In this respect the testimony of the defendant is as follows:

"Mr. Rothbart: Q. Where is that car?
A. My friend is driving.
Q. Who is your friend?
A. A good friend.
Q. Who is it?
A. You want his name?
A. Tell us.
A. Well, my cousin.
Q. What is his name?
A. Beamer.
Q. What is his name and where does he live?
A. I don't know where he lives.
Q. You don't know where your cousin lives? A. No.
Q. What is his first name? A. Mike.
Q. How do you spell his last name? A. I don't know.

Q. If you want to get that automobile now, where would you go to get it?
A. I don't know, I don't know where he is now located.
Q. I insist this witness should be required to tell the truth.
The Court: I can't make him tell the truth.
Mr. Rothbart: You can't, but you can admonish him. It is very apparent that he is falsifying.
The Court: I would certainly have a good job if I could make the people tell the truth.
Mr. Rothbart: It is very apparent he knows where this car is.
The Court: It is very apparent he knows the purpose for which you are asking the question.
Mr. Rothbart: Yes, certainly."

For the reasons stated we are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

McGuraly, P. J., and Matchett, J., concur.

431 - 29848

JEROME L. GREEN,
Appellee,

vs.

FOREMAN & CLARK, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 654

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Jerome L. Green, the plaintiff, against Foreman & Clark, a corporation, the defendant, to recover $55 alleged to be due the plaintiff for services as a salesman rendered to the defendant.

The defendant was engaged in the clothing business. The plaintiff was employed by the defendant as a salesman about September 12, 1923. At the time of his employment the plaintiff signed an agreement which provided that he was to receive a weekly salary of $35; was to abide by and comply with the rules and regulations stated in the agreement; was to have a legal claim upon the defendant for his weekly salary only; was to have the usual bonus paid to other salesmen if after the first thirty days of his employment he lived up to the rules and regulations and had demonstrated his ability and efficiency to the satisfaction of the defendant. The agreement further provided that if the plaintiff's employment ceased at any time during any calendar month he was not to have a bonus for any part of that month.

About October 13, 1923, the plaintiff was discharged for alleged discourtesy and rudeness to a customer. About a week later the plaintiff re-entered the employ of the defendant and was paid a bonus that he had earned during the month of October. When the plaintiff entered the employ of the defendant the second time he did not sign an agreement. About November 17, 1923, the

plaintiff was discharged for the alleged violation of a rule of the defendant.

It is the contention of the plaintiff that the agreement signed by him when he was first employed by the defendant did not apply to the second period of his employment; that during the second period he was working on a drawing account and commissions, and that he had earned commissions amounting to $55.75, which the defendant refused to pay to him.

The contention of the defendant is that the character of the plaintiff's employment during the second period was merely a reinstatement, not a new employment; that he was in fact working under the agreement that he signed when he was first employed; that the plaintiff was discharged during a calendar month for the violation of one of the defendant's rules, and that therefore the plaintiff was not entitled to any bonus.

As we have reached the conclusion that the evidence does not show that the plaintiff was discharged for the violation of any rule of the defendant, it is unnecessary to determine the question whether during the second period of his employment the plaintiff was working under the written agreement.

The only evidence in regard to the reason for the discharge of the plaintiff the second time is the testimony of the plaintiff himself, which is as follows:

> "Q. Why were you discharged the second time?
> A. They had a meeting one night and said that if a salesman left a coat on the table he would be discharged. One night I got a ticket stating I was discharged because I had left my coat on the table. I talked to the sales manager, where the report had come from, and he said no, I left a hanger on the table."

The only rule of the defendant that seems to have any relevancy whatever to the question is rule 8, which is as follows:

> "8. Salesmen must hang customers' garments on stand provided for this purpose, and not on tables or chairs, which necessitates a later search. Salesmen must bear in mind that

Foreman & Clark are not responsible for customers' garments or valuables of any nature contained in pockets of customers' garments; therefore we demand a strict observance of this rule."

This rule relates to "customers' garments," not to coats of salesmen. Furthermore, even if the rule was in reference to coats of salesmen, there is no evidence that the plaintiff left his coat on the table. The plaintiff's testimony is not susceptible of such a construction. In his testimony the plaintiff did not admit that he left his coat on the table. He merely said that he received a ticket stating that he had, but that he talked to the sales manager, "where the report had come from," and that the sales manager said that it was not a coat but a hanger.

Counsel for the defendant have not indicated what rule, if any, the plaintiff violated the second time he was discharged. The only reference that counsel for the defendant make to the second discharge of the plaintiff is that he was discharged for "violating a rule." What rule is not pointed out.

Counsel for the defendant contend that "there is no evidence in the record to support the judgment in view of the undisputed receipts" of the plaintiff "in full settlement of all claims and demands." We presume that in this contention counsel for the defendant are relying on the defense of accord and satisfaction. The record will not, however, admit of such a defense, as there is no evidence that there was any dispute in regard to the claim of the plaintiff at the time he signed the receipts. The rule is a familiar one that in order that there may be an accord and satisfaction in regard to a claim, the claim must be in dispute. The Farmers & Mechanics Life Association v. Caine, 224 Ill. 599, 607; Day Snellurtz Lumber Co. v. Serrell, 177 Ill. App., 30, 36.

Counsel for the defendant argue at some length that the contract in question is not contrary to public policy. We do not find that this question is discussed by counsel for the plaintiff.

However, we do not think the contract is in contravention of public policy.

We are of opinion that the judgment should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

29861

444 - 29861

HARRY VERBEEK,
Appellant,

vs.

B. H. WOLFF,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 655

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Harry Verbeek, the plaintiff, from a judgment rendered against the defendant, B. H. Wolff, in the sum of $60, in an action brought by the plaintiff on two promissory notes amounting to $410.23.

On January 9, 1925, on motion of the defendant this court struck the bill of exceptions from the record.

The only grounds on which the plaintiff asks for a reversal relate to the evidence. In the absence of the bill of exceptions these questions cannot be considered.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

136 - 29551

BRIELL-ROSENBERG COTTON GOODS COMPANY, a Corporation,
Appellant,

vs.

W. LEWALD & COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 655

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff, a corporation organized and existing under the laws of the state of Missouri. It sued for the value of goods alleged to have been sold to the defendant at St. Louis, Missouri, for an agreed price, which defendant refused to accept.

The defendant, a co-partnership doing business in Chicago, filed an amended affidavit of merits in which it denied the sale and delivery of the goods at St. Louis, Missouri, alleged that the sale was to be completed in Illinois, that it was not a transaction in interstate commerce; that the defendant was a foreign corporation at the time of the transaction and not licensed to do business in Illinois, and that the plaintiff was doing business in violation of Section 94 of the General Corporation Act. The affidavit also set up the defense of the Statute of Frauds and alleged a mutual agreement to cancel the order for the goods.

The only defense insisted on, however, was the bar of the state statute, and the court at the conclusion of the evidence, being of the opinion that plaintiff, by reason of this statute, was barred from maintaining its suit, directed the jury to return a verdict for the defendant, upon which, after motions for a new trial and in arrest were denied, the court entered judgment.

The statute in question is highly penal in its nature and has therefore been construed strictly. It is not easy to

collect from the decided cases a general rule by which it may be determined when a corporation is or is not doing business within its meaning.

The evidence tended to show that the main offices of the plaintiff are and always have been in St. Louis, Missouri; that the order for the goods was given at the Chicago office of the plaintiff; that this order was entered in an order book which was then sent to St. Louis; that afterwards the goods (cotton cloth) to the amount of 9500 yards was set aside and placed in a warehouse in St. Louis, and the balance delivered to a Chicago corporation on the order of defendant.

Irrespective of the question whether the evidence proved that the plaintiff corporation was doing business in this state, we think the instruction given by the court was erroneous for the reason that the evidence failed to show that the transaction out of which the suit arose was not one in interstate commerce, but, on the contrary, affirmatively established that it was such a transaction.

The affidavit of merits in substance set up a defense which amounted to a plea in bar of the action, and this court has held in a similar case that the pleading of the defendant must negative the fact that the transaction was one in interstate commerce. Bamberger-Stern Co. v. Anderson et al., 207 Ill. App. 222. As this allegation was a material and necessary one, it was also necessary that there should be proof sustaining it. There is no such proof.

As was said by Mr. Justice Sanborn in Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. Rep. 17; "Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and

dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

And the Supreme Court of the United States, in Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, said, in considering a defense of this kind: "Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse."

Defendant cites two cases - American Steel & Wire Co. v. Speed, 192 U. S. 500, and Bacon v. Illinois, 227 U. S. 504 - where the questions were whether certain taxes imposed amounted to unlawful burdens on interstate commerce. These cases are not at all applicable here.

For the error in directing a verdict the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McBurney, P. J., concurs.

Johnston, J., dissents.

201 - 29618

CHARLES A. STRAND,
Appellee,

vs.

ERIC J. STRAND,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237 I.A. 655

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant has appealed from a decree canceling a contract and enjoining him from claiming or asserting any rights under it.

The decree also found that, under one section of the contract, defendant was liable to complainant for the sum of $10,000 and entered judgment against him for that amount.

Complainant and defendant are brothers. Complainant is the owner of a device used in sharpening safety razor blades, for which letters patent have issued. The defendant is a manufacturer. Differences grew out of a contract in writing made between them on December 30, 1920. The preamble to the contract recites:

> "it is the desire of both parties that said second party have the entire and exclusive right to manufacture and market the above referred to device or machine *** paying to said first party a royalty on each machine or device as manufactured and sold."

Thirteen paragraphs follow, in the first of which defendant agrees "to manufacture and market said device or machine without expense to the said first party and to pay said first party a royalty of ten cents on each and every machine or device manufactured and sold."

In the fourth clause it is agreed that the device or machine shall be placed on the market so as to retail for not more than $1.50 each, provided "the cost of manufacturing and marketing said device remains substantially the same as it is now."

The fifth clause provides: "Said parties further agree that said party of the second part shall manufacture and market not less than 100,000 of the aforesaid machines or devices during the first year this contract may be in full force and effect, beginning July 1, 1921, and during any succeeding year that this contract may be in full force and effect."

The seventh clause provides that defendant shall have the entire and exclusive right "to manufacture and market in the United States of America, etc."

The eighth clause provides that defendant agrees to protect at his own cost any infringement or claims of all parties.

The ninth clause provides that the duration of the contract should be one year, beginning July 1, 1921, but also provided that defendant "shall have an exclusive renewal option on this contract under the same terms and for the same consideration as set forth in this contract," by giving notice in writing on or before the first day of June of each consecutive year.

The twelfth clause provides that it is understood and agreed by and between the parties that defendant has executed a contract with one Drury Livesay "for the marketing of this machine or device," and it is agreed that, in the event Livesay should cancel said contract, defendant should have ninety days from the date of cancellation to make arrangements for a new distributing agent, and that this time should be deducted from the lifetime of the contract.

July 18, 1922, after the execution of the contract, complainant filed suit in the Municipal court of Chicago, demanding royalties to the amount of $1,420, alleging that sharpeners to the number of 14,200 had been manufactured and sold by the defendant. The jury returned a verdict in the sum of $1112.80, on which judgment was entered and paid.

The suit in which the decree appealed from was entered was begun on January 5, 1924, and was in the nature of a bill for

accounting.

The cause was referred to a Master and the matter was heard by the Chancellor upon exceptions to the report of the Master, which exceptions, however, have not been preserved in the abstract.

The principal matter of controversy between the parties involves the proper construction of the fifth clause of the contract.

The Master held and the decree finds that the suit brought in the Municipal court precluded further recovery by plaintiff of royalties which had accrued prior to that time. The Master and the court further found, however, that clause 5 should be construed as a minimum guarantee on the part of defendant that he would pay royalties on at least 100,000 sharpeners a year, and it was upon that theory that the judgment for $10,000 was entered.

The defendant contends that the contract was ambiguous and that the court should have received oral evidence in order to determine the true meaning of it. On the contrary, the finding of the decree is that the contract is unambiguous, and that under clause 5 defendant is bound to pay royalties on not less than 100,000 of the sharpeners each year. While defendant contends that the court erred in not receiving evidence to explain the supposed ambiguity, the evidence, if any, offered for that purpose is not pointed out nor any exceptions to the ruling of the Master in excluding it called to our attention.

The object of construing every contract is to arrive at the intention of the parties, and this intention must, if possible, be determined from the words used.

The defendant says that there is a distinction between the words "market" and "sold" as used in this contract, and, as tending to establish this theory, points out that clause 12 recited the execution of a contract with Drury Livesay for the marketing of the device; and defendant argues (if we understand him aright) that

these devices were marketed within the meaning of the contract when delivered to Livesay, but that no royalty would be due or payable upon the same unless the same were thereafter sold. This construction cannot be adopted.

In the first place, the contract grants to defendant the exclusive right to manufacture and market, with the further exclusive option to renew the contract by notice from year to year. Unless, therefore, some clause in the contract provides for a minimum royalty, it would be possible for defendant to hold the exclusive license granted without paying any compensation whatsoever for the same. It would be most unreasonable to hold that the parties to the contract so intended.

In the second place, (reading the entire contract) it appears that the words "market" and "sell" are used interchangeably and for the purpose of conveying the same idea. This appears from the preamble, where provision is made that defendant have the exclusive right "to manufacture and market," while in the second paragraph the provision is thatddefendant shall pay a royalty on each machine "manufactured and sold." Again, in the fourth paragraph, there is a provision that the retail price of the device shall not be more than $1.50 each, provided the cost of "manufacturing and marketing" remains the same.

Again, in the seventh paragraph, defendant is granted the exclusive right "to manufacture and market," and, as complainant points out, unless "market" means "to sell," the contract grants to the defendant no right to sell the device at all.

That defendant has construed the contract as giving him the unrestricted right to sell the device appears from the evidence. As a matter of fact, the contract with Livesay was canceled prior to the time when the contract here construed went into effect. Complainant was not notified of this cancellation nor was he a party to it in any way. It would therefore seem that the construction

defendant has heretofore put upon the contract is contrary to that for which he now contends.

Moreover, defendant, without agreement with complainant, made a further contract with one Anderson to act as sales agent in the matter, and Anderson so acted from July 1, 1922, to July 1, 1923.

That the verb "market" means "to sell" is established by the definitions as given in all the standard dictionaries, and in Millman v. Meher, 20 Barb. (N.Y.) 37, it has been expressly held that "market" and "sell" are equivalents. The court there said: "Montgomery was 'to market' the crops. The phrase to market has a definite and well understood signification, and means to sell."

It is urged in behalf of defendant's theory that the complainant himself has construed this contract in such a way as to sustain defendant's contention, because, in the suit brought in the Municipal court demand was made only for royalties on devices actually sold, and no claim was made under clause 5 of the contract. The defendant cites McLean Coal Co. v. Bloomington, 234 Ill., 90; Gillett v. Teel, 272 Ill., 106; and Geithman v. Sichler, 265 Ill., 579, to the point that where contracts are in their terms uncertain or doubtful and the contracting parties by their conduct have placed a construction upon the provisions of the contract which is reasonable, this construction will be adopted by the court.

There is no question about that rule of law, although we do not think it applicable here because it does not clearly appear that complainant ever adopted the construction for which defendant contends. It is altogether consistent to believe that complainant made a mistake as to the law, supposing that he could maintain separate suits under the different clauses of the contract. If so, he is not the only person who has been

unaware that the rules of law forbid splitting up a cause of action. Moreover, we do not think that the contract is ambiguous. See Young v. Illinois Athletic Club, 228 Ill. App. 594, and the same case in 310 Ill. 75; also Finch v. Theiss, 267 Ill., 63; and Rosenbaum Bros. v. Devine, 271 Ill. 354.

The construction contended for is unreasonable and fanciful, and if given effect would result in the grant of an exclusive license for an indefinite period without assurance of compensation. Such agreement was not intended.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

29760

343 - 29760

LILLIAN LLOYD,
Appellee,

vs.

HARRY G. LLOYD,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

237 I.A. 655

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant was the defendant to a bill for divorce brought by his wife, Lillian, and a decree in her favor was entered on October 30, 1920, the decree finding that the defendant had been guilty of habitual drunkenness.

The marriage was dissolved and it was ordered that defendant should pay as alimony and for the support and maintenance of their minor children the sum of $55.00 a month.

The record shows numerous orders and rules on defendant to show cause why he should not be held in contempt for failure to comply with this order.

June 23, 1924, such a rule was again obtained on an affidavit of the complainant to the effect that the defendant was in arrears $2,420 on account of alimony and $50.00 on account of solicitor's fees.

The defendant answered the rule, and upon the hearing the court found that he was in arrears in the sum of $2,420; that he had not shown sufficient cause why the same should not be paid or that he was unable to pay the same; but that, although able so to do, he wilfully failed and refused to obey the decree of the court; that he was guilty of contempt. It was therefore ordered that defendant be committed for a period not exceeding six months or until he would pay the sum due or until released by due process of law, and from that order this appeal has been perfected.

The defendant contends that the order must be reversed because the complainant has not preserved the evidence by a certificate, citing French v. French, 302 Ill., 152, and many other cases supporting the rule as there announced.

There are two sufficient answers to this contention. First, that in divorce cases, in which (unlike those for separate maintenance) the parties are entitled to a trial by jury, it is not necessary that the evidence should be preserved by the party desiring to sustain the decree; and, second, that in this case the findings of fact are sufficient to sustain the order as made.

The order affirmatively finds as facts the amount due and unpaid; that defendant is able to pay it; and that his failure to do so is wilful. These findings are sufficient.

Moreover, it appears from the certificate of the clerk that the record of the cause presented here is complete, and an examination thereof discloses that the findings of the decree are based upon defendant's sworn answer to the rule. That answer was in part an attempt to impeach the decree of divorce theretofore entered. It could not be so impeached. The answer, in so far as it pertains to defendant's financial ability to comply with the decree, is vague and indefinite and fails to make a full disclosure.

The answer says that at the time the bill for divorce was filed defendant was making a sufficient income to support his family; that, as result of the action of complainant, "defendant lost a great amount of business," was forced to remove from the premises he was occupying; that he "was forced to obtain jobs wherever he could for his support;" that at the time the amended bill for divorce was filed he had an automobile "which the complainant destroyed and rendered useless and of no value;" that he had not been allowed to see his child; that the child's mother

told her not to eat candy which defendant gave her because defendant had poisoned it; that the complainant told him that the decree would never be enforced; and that she would never in the future ask anything for alimony or the support of the child.

Defendant says that since his business was destroyed he has been unable to secure regular employment; that he has been unable to pay for his board and lodging and has been forced to sell a second-hand Buick automobile to the person with whom he boards and lodges.

The alleged agreement to modify the provisions of the decree was not binding. Walter v. Walter, 189 Ill. App. 345. If there are equitable reasons why the decree should be modified, those facts should be presented to the court in the proper way. The answer failed to show either the amount of property possessed by the defendant or the amount and sources of his income. The burden was on defendant to show cause why he should not be held in contempt. The evidence from which the material and ultimate facts could be made to appear was in his possession.

The answer fails to show a fair and full discovery of defendant's financial condition, and the order is therefore affirmed.

AFFIRMED.

McBurney, P. J., and Johnston, J., concur.

398 - 29815

456

LUCRETIA L. PETERSON,
Appellee,

vs.

J. F. LONG,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 656

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant to a tort action where there was a verdict for plaintiff in the sum of $1,000, on which judgment was entered.

The evidence showed that the plaintiff was injured on October 20, 1922, while riding with her husband in a Paige Sedan automobile, which the husband owned and drove. The Paige Sedan was at this time being driven in a southerly direction on Michigan avenue, on the right or west side of the street. The injury to plaintiff was caused by the collision of the Paige Sedan with a Packard automobile, which at the same time and place was being driven in a southerly direction and on the east side of the street.

There was also evidence tending to show that the collision between the Packard and the Paige Sedan cars came about through the negligence of the defendant, who, at the same time, was driving his automobile in a southerly direction on the same street and, overtaking the Packard car, attempted to pass it on the right side (contrary to the provisions of the State statute and the South Park Ordinances (See Illinois Rev. Stats., chap. 95A, sec. 41)) and cut in ahead of the Packard car. Indeed, the negligence of the defendant is not denied.

The first contention is that the judgment should be reversed because the jury was improperly informed that the case

was being defended by a liability insurance company. McCarthy v. Spring Valley Coal Co., 232 Ill. 473; Mithen v. Jeffery, 259 Ill. 372; Volkmann v. Bressman, 129 Ill. App. 182; Wullner v. Smith-Lehr Coal Co., 145 Ill. App. 486; Hamblatt v. Young, 190 Ill. App. 312; Hall v. Scott, 231 Ill. App. 494; and Akin v. Lee, 206 N. Y. 20, are cited to this point.

The defendant points out that, in the examination of a witness, Wojewodkis, (a Yellow cab chauffeur who witnesses the accident and testified to the facts) he on cross-examination was asked by defendant's attorney to verify the signature of the witnesses to a paper described as "Defendant's Exhibit 1." The paper was offered in evidence by defendant and plaintiff objected.

To the suggestion of defendant's counsel that the signature was that of the witness, the court said:

> "Give me the paper; if you want me to qualify the witness, I will attempt to do so. That is your signature?
> A. Yes, sir.
> The Court: Look at that writing above your signature; read that. (Handing witness paper.)
> A. This is my signature, but that thirty-five miles an hour was not verified by me.
> The Court: Was the upper part of this paper, above your signature, in your handwriting?
> A. No, I did not write that. That was what the adjustor made, right after the accident, took that statement, from that same statement."

Thereupon, the defendant, out of the hearing of the jury, moved that the statement of the witness that an adjustor prepared the statement should be stricken out, a juror withdrawn, and a new jury impaneled, stating that the witness had intimated that an adjustor of an insurance company called to get the statement. The motion was denied.

The next matter occurred during the examination of a witness called by the plaintiff, named Peterson, who, it appears, was the chauffeur who drove the Packard car at the time of the accident. In the course of examination he was asked by the plaintiff's attorney:

"Q. Do you remember any conversation you had with Long at that time?

A. Well, it was just exchanging our numbers. He gave me his number, said he was covered, and everything would be taken care of, gave me his name and address."

Thereupon, out of the hearing of the jury, defendant made motion that the "last statement be stricken, a juror withdrawn and a new panel drawn." This motion was denied.

The cases cited by the defendant establish the rule that the admission of evidence tending to show that a defendant is indemnified by insurance or that his case is being defended by an insurance company, is error. These cases further hold that, where an attorney for a plaintiff by propounding questions which are immaterial succeeds indirectly in getting information to the jury that the defendant is insured or that an insurance company is defending his case, a judgment obtained by such methods will be reversed. In other words, the courts of this and other states hold that evidence as to these matters is wholly immaterial, and also recognize the fact that such information is quite likely to unduly prejudice a jury to the injury of a defendant.

Manifestly, however, the doctrine has its limitations. It has not, we believe, ever been held in any well considered case that evidence which is material and pertinent will be excluded because it may appear therefrom that an insurance company is interested in the defense.

The Illinois cases cited by defendant seem to have been based upon the theory that the attorneys for the plaintiffs succeeded, by improper questions, in getting immaterial evidence before the jury. The New York cases seem to have been decided upon the same theory and to recognize the exceptions and limitations which we have pointed out. (See Grant v. National Ry. Spring Co., 91 N. Y. S. 805; DiFammaso v. Syracuse University, 158 N.Y.S. 175, affirmed in 218 N. Y. Court of Appeals, 640.)

We do not think the statement of the witness, Wojewodkis, was either objectionable or harmful. There was nothing said to indicate to the jury whether the adjustor represented the plaintiff, the defendant, or the owner of the Packard car, and it certainly cannot be said that it was immaterial to inquire who had in fact written a paper which the defendant offered in evidence.

Nor do we regard the ruling of the court with reference to the statement of the witness, Peterson, as erroneous. The witness was narrating a conversation with the defendant which occurred immediately after the accident and with reference to it. His statement that everything would be taken care of, coupled with the further fact that he gave to defendant his name and address, was evidence which the jury might very properly consider as tending to show an acknowledgment on his part of responsibility for the accident.

The motion of the defendant was to strike out the entire statement and to withdraw a juror. Had the motion been specifically to strike out the statement to the effect that defendant "was covered," a different question would be presented.

Moreover, this case is distinguishable from those cited by defendant, in that it does not here appear that there was any improper conduct on the part of the attorney for the plaintiff, or that he used any subterfuge to bring out the matter of which complaint is made.

It is further contended by the defendant that the court erred in instructing the jury.

The court instructed the jury orally. At the request of the plaintiff the court informed the jury that, at the time of the accident, there was an ordinance of the South Park Commissioners in full force and effect providing that all vehicles overtaking other vehicles should, in passing, keep to the left. Further, that it was the law of the State of Illinois that, when

any person operating a motor vehicle should overtake any other vehicle, he should pass on the left side thereof.

The defendant asked the court to instruct the jury that, while the ordinance of the South Park Commissioners provided for passing and overtaking an automobile on the left, still, if they believed from the evidence that the rule was habitually disregarded at the point of the accident with the knowledge and acquiescence of the South Park police and commissioners, then, even if the defendant did pass the Packard automobile on the right, this would not be conclusive evidence of negligence on the part of the defendant.

The defendant says that the ordinance and the state law had no application to the facts of the accident and that the jury might well have thought that the mere fact that defendant was on the right-hand side of the Packard car just before the accident, in and of itself made the defendant liable as a matter of law, because he was in the act of violating the ordinance and the state law. We think the attempt of the defendant to pass the Packard car on the wrong side was clearly one of the contributing causes of the accident and that the court did not err either in the instruction given or refused on this point.

It is also urged that the court erred in an instruction given on the subject of damages. With other items (for which the jury was told plaintiff might recover) was included "such amounts as she has paid or become liable to pay, if any, in endeavoring to be healed or her injuries, if any." There was no evidence tending to show that any sum had been paid for this item or the amount, if any, for which the defendant had become liable. While the item should not have been included, we do not think the inclusion of it was reversible error. Thompson v. Northern Hotel Co., 256 Ill. 77. Moreover, since the instruction was oral, we

think, in order to preserve this question, the defendant should have made specific objection to this particular item at the time the instruction was given; and that, having failed to do so, he cannot now complain.

It is also urged that the judgment is excessive. The evidence for plaintiff tends to show that, when the collision took place, plaintiff was thrown from her seat and that her head struck against the front seat of the automobile, and that she became unconscious; that for some time after the accident she could not talk and had lost the power of speech; that she remained in bed for about two weeks and was in bed off and on for about two or three months; that she has not been able to do her usual work; that she is in a nervous condition and has continuous pains in her head; that at the time of the trial she was still under the doctor's care. The attending physician gave evidence tending to show that her health prior to the accident was good.

Dr. William Hazlett, who attended defendant immediately after the injury, was called as a witness by defendant and stated that immediately after the accident he examined the plaintiff's arms, shoulders, fingers and wrists and chest for pain or broken bones, but found none; that he made an examination of the head, including the eyes; that the pupils were found to be normal; that he tested the reflexes at the knee to ascertain if there had been any involvement of the nerves that went to the extremities, and found there was not; that the patient was nervous, excited, and the extent of his aid to her was quieting of the nervous state which she was in at the time; that he saw her that one time only; that he gave her a sedative and instructed her that she should rest for an hour and then ought to be able to make the trip home from the place. He says there was no evidence of concussion of the brain and that her conversation at the time in question "was

the normal conversation that one receives from a patient in the state she was in."

We think it was for the jury to weigh this conflicting evidence, and while the verdict may be somewhat larger than we think it ought to have been, nevertheless we cannot say that it is so large as to indicate passion or prejudice.

There is no reversible error in the record, and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

416 - 29833

A. E. SCHMALZ and D. BURROWS,
Doing Business as BURROWS & COMPANY,
Appellees,

vs.

COMMERCIAL CASUALTY INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

237 I.A. 656

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs, who are appellees in this court, sued the defendant on an insurance policy wherein defendant promised to indemnify plaintiffs against liability under the Workmen's Compensation Law. The trial was by the court without a jury and there was finding for the plaintiff in the sum of $168.12, upon which judgment was entered.

It is argued that the court erred in finding for the plaintiff and entering judgment, the contention being that upon the uncontradicted evidence plaintiffs could not recover.

The material facts disclosed by the evidence are that plaintiffs do business as a copartnership, manufacturing electrical apparatus; that in the latter part of May, 1923, one of the partners applied to one Tuck, an insurance broker, for a compensation policy. Tuck informed one of the partners a few days later that he was having trouble in placing the insurance, but that it would be delivered within a few days.

It further appears that Tuck went to the office of H. A. Napier & Company, representing the defendants, on June 18, 1923, at two o'clock p. m. Plaintiffs' application was presented at that time and the risk accepted.

The policy issued as of that date provides: "The period during which the policy shall remain in force, unless canceled, as in the policy provided (herein called the policy

period) shall be from June 18, 1923, to June 18, 1924, at 12:01 o'clock a. m. standard time, as to each of said dates."

At about 10 a. m. on the morning of June 18th one of the employes of the plaintiffs was injured through an accident which arose out of and in the course of his employment. Between twelve and one o'clock on the same day one of the partners called up Tuck and asked him if he had the policy. He did not, however, inform Tuck that there had been an accident to the employe on the morning in question, and at the time the policy issued the defendant company, R. A. Napier & Company, and Tuck were without knowledge of the accident.

We think that on these undisputed facts plaintiffs cannot recover. It was their duty to disclose to Tuck the fact as to the happening of the accident, which knowledge, when obtained by Tuck, it would have been his duty to disclose to the agent of defendants.

The law is stated in Joyce on Insurance, vol. 1, paragraph 107, as follows: "Where a loss occurring before the risk attaches is known only to the applicant and he obtains a policy without disclosing the fact of loss, the policy is void even though the contract be given a date prior to the loss."

This doctrine is sustained by these cases: Merchants Insurance Co. v. Paige, 60 Ill. 448; Palmer v. Bulldog Auto Insurance Co., 294 Ill. 287; Gauntlett v. Sea Insurance Co., 127 Mich. 504; McLanahan v. Universal Insurance Co., 1 Peters, 170; Whitaker v. Farmers Union Insurance Co., 29 Barb. N. Y. 312; Wales v. N. Y. B. Fire Insurance Co., 37 Minn. 106.

The plaintiffs argue that these cases are not applicable because, they say, in each of them the application for the insurance was made by the insured subsequent to a loss with

knowledge of the same and without disclosure of this knowledge. However, it appears here that one of the partners made inquiry of Tuck, thus practically renewing the application, without disclosure of the accident which had occurred but a few hours before. The obligation to disclose existed at that time and was not less than it would have been had the accident occurred prior to the first application.

The judgment is reversed.

REVERSED.

McSurely, P. J., and Johnston, J., concur.

477 - 29894

ELKIN GINSBURG, Appellee, vs. BULL DOG AUTO FIRE INSURANCE ASSOCIATION OF CHICAGO, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

237 I.A. 656

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued as the assignee of a certain policy of insurance issued by defendant to one D'Alassandro, whereby the defendant assured him against the loss of his automobile by theft.

In an amended declaration plaintiff alleged the assignment in writing to him by D'Alassandro on March 17, 1920, of all money due from plaintiff to defendant.

Defendant pleaded the general issue and specially that the policy was not assignable without the consent of defendant's attorney in fact, which had not been obtained; and further, that the policy was void by reason of certain false representations made by the assured. There were motions by defendant at the close of plaintiff's evidence and again at the close of all the evidence, for an instructed verdict in defendant's favor, which motions were denied. There was a verdict for plaintiff of $1,000 and judgment on it.

The alleged assignment was received in evidence and is as follows: "For value received I herewith assign all my right, title and interest in Policy 11733-D upon Chalmers car No. 3651 to E. Ginsburg. Nick D'Allassandro."

The defendant is a mutual company, calling itself "The Association." The policy states that it is issued in consideration of the premium and of the stipulations, provisions and warranties stated in the power of attorney, application, sub-

scriber's contract and policy, each of which is made a part thereof. The "subscribers" severally in their respective proportions agree with the insured to grant the subscriber automobile insurance coverage as stated in the policy, provided the coverage sought is specifically stated and set forth and all warranties and statements made in the application are true and correct and all premium charges and assessments for each specific coverage, membership fees and per capita tax are paid.

Paul R. Goddard was named in the application as Attorney in Fact for the applicant and empowered to exchange for him, with other subscribers, contracts of insurance, and to execute for the applicant any and all documents and contracts and to do any and all acts the applicant might or could personally do or which might become necessary or advantageous to carry out the purposes of the Power of Attorney or to comply with the laws of any state in which insurance was written. This power of attorney, it was agreed, might be cancelled or annulled by either party giving the other ten days notice in writing, and upon cancellation the contract was to be liquidated. The insurance policy specifically provides: "No assignment of interest under this policy shall be made or become binding upon the Association, unless the written consent of the attorney is endorsed thereon and an additional life membership fee is paid."

The proof fails to show that the attorney gave his consent to the assignment or that any additional membership fee was paid, and, if this provision of the policy is held valid, it would seem the assignee plaintiff cannot recover and that the instruction for defendant at the close of all the evidence should have been given.

The authorities seem to hold that a provision against

the assignment of this sort of contract of insurance, in the absence of some statute providing otherwise, is valid. Thus in Corpus Juris, vol. 32, p. 1091, it is stated:

> "Being a voluntary contract, the parties may make it on such terms, and incorporate such provisions and conditions, as they see fit to adopt, and the contract as made measures their rights, provided of course the agreement does not violate any principle of the common law or any provision of a constitution or statute."

And the same authority states, at page 1240:

> "But a policy cannot be assigned where the contract is considered a personal contract between the company and the insured, or where the assignment is expressly prohibited by the terms of the policy, unless the company consents to the assignment."

While the question does not seem to have been passed upon by the courts of Illinois in the construction of any insurance contract, the rule has been laid down with reference to building contracts in Mueller v. Northwestern University, 195 Ill. 236. In that case the court said:

> "The rule is laid down in volume 2 of the American and English Encyclopedia of Law (2nd ed., p. 1036) that the parties to a contract may in terms prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him, and the rule thus announced is well supported by the authorities."

The rule has also been announced by the Supreme Court of the United States in Arkansas Smelting Company v. Belden Mining Company, 127 U. S. 379, where the contract was one for the delivery of certain ore. And in Delaware County v. Diebold Safe and Lock Co., 133 U. S. 473, where the suit was by a sub-contractor, an assignee of a contractor. See also Burck v. Taylor, 152 U. S. 635; City of Omaha v. Standard Oil Company, 55 Neb. 337; LaRue v. Crocninger, 84 Calif. 281; Stephenson v. Germania Ins. Company, 100 Nebraska, 486.

The courts of Michigan have held the rule applicable to insurance contracts in McNatt v. Patrons' Mutual Fire Insurance Company, 210 Mich. 610, and Kamm & Schellinger Brewing Company v.

St. Joseph County Village Fire Insurance Company, 168 Mich. 606.

In the last named case particular reasons are pointed out why the rule should be applied to policies of mutual insurance companies. It is said:

> "Mutual insurance is essentially different from stock insurance, and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. *** And it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself."

The plaintiff cites Ga. Co-Op. Fire Ass'n v. Borchardt & Co., 123 Ga. 181, where it was held that, after the loss the claim of the insured could be assigned like any other chose in action without in any way affecting the insurer's liability. The decision was based upon the provisions of a section of the Georgia code, which specifically provided that after a loss occurred the sale of the property and transfer of the policy would not affect the liability of the insurer, but the assignee might recover.

West Fla. Gregory Co. v. Teutonia F. Ins. Co., 74 Fla. 320, is also cited by plaintiff; but an examination of this case shows that the validity of the assignment was not questioned and the same situation existed in Richardson v. White et al., 167 Mass. 58, which is also cited to this point. Stevens v. Queen Ins. Co., 32 N. B. 387, is cited; but in that case it appears that the policy had been assigned with the consent of the defendants.

Plaintiff also calls our attention to Carter v. Humboldt F. Ins. Co., 12 Ia. 287, and Merchen v. Nat'l Ins. Co., 34 Ia. 67; but these decisions were also based upon the provisions of a statute of that State which provided in substance that, although by the terms of the instrument its assignment was prohibited an assignment should nevertheless be valid, but the maker might avail

himself of equitable set-offs. Spears v. Home Mut. Ins. Co., 17 Fed. 563, is cited; but the proceeding there was by a bill in equity, not by a suit at law. Laidlaw v. Hartford F. Ins. Co., 10 Atla. L. 7, is cited. It appears in that case that the plaintiff (who sued as the assignee of the insured) was also the mortgagee for whose benefit, as his interest might appear, the insurance policy was issued, and it is apparent that the decision of the court was based upon equitable grounds. Moreover, the opinion does not indicate that there was an express provision in the policy against assignment.

We think that both on reason and authority, in an insurance policy of a mutual company (such as the evidence here indicates the defendant to be), a condition against assignment without permission is valid and the assignee cannot recover.

It follows the plaintiff cannot recover, and the judgment is therefore reversed without remanding the cause.

REVERSED.

McBurnely, P. J., and Johnston, J., concur.

44 1/2 a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

237 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On JAN 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State
of Illinois,
Defendant in error,
vs.
August Beernaert,
Plaintiff in error.

Error to the
County Court of
Rock Island County.

237 I.A. 657

Jett, P. J.

The prosecution in this case was begun in the County Court of Rock Island County, by the state's attorney of said County filing an information, on August 6, 1923, in which the plaintiff in error was charged with the violation of the Illinois Prohibition Act. There are two counts in the information. The first count charges that August Beernaert, on the fourth day of August 1923, at and within the said County of Rock Island, state of Illinois, aforesaid did then and there unlawfully possess intoxicating liquor at the premises known as number 1365, Thirteenth Avenue in the City of East Moline, County of Rock Island and State of Illinois while the said City of East Moline was then and there prohibition territory contrary to the form of the statute. Since the plaintiff in error was found guilty under the first count only it will be unnecessary to set out the second count of the information.

Plaintiff in error when arraigned in open court pleased not guilty. A jury trial was had and the jury found the said August Beernaert, the plaintiff in error, guilty as charged in the said first count of the information. Plaintiff in error filed a motion in the arrest of judgment. The Court overruled the motion in arrest of judgment and rendered judgment on the verdict of the jury and sentended the plaintiff in error to sixty days in the County jail of Rock Island County.

The cause is brought to this court on a writ of error. The question involved and the only question discussed is the sufficiency of the information. In People vs. Reisez, 226, Ill. App. 363 we had occasion to consider the sufficiency of an allegation of the kind

The People of the State
of Illinois,

Defendant in error,

vs.

August Beerneert,

Plaintiff in error.

Error to the
County Court of
Rock Island County.

237 I.A. 557

Jett, J.

The prosecution in this case was begun in the County Court of Rock Island County, by the attorney of said County filing an information, on August 6, 1928, in which the plaintiff in error was charged with the violation of the Illinois prohibition act. There are two counts in the information. The first count charges that August Beerneert, on the fourth day of August 1928, and within the said County of Rock Island, state of did then and there unlawfully possess intoxicating liquor in the premises known as number 1305, Thirteenth avenue in the City of East Moline, County of Rock Island and State of Illinois, while the said City of East Moline was then and there prohibition territory contrary to the form of the statute. Since the plaintiff in error was found guilty under the first count only it will be unnecessary to set out the second count of the information.

Plaintiff in error when arraigned in open court pleaded not guilty. A jury trial was had and the jury [illegible] August Beerneert, the plaintiff in error, guilty as charged in the said first count of the information. Plaintiff in error filed motion in the arrest of judgment. The Court overruled the motion in arrest of judgment and rendered judgment on the verdict of the jury and sentenced the plaintiff in error to six [illegible] County jail of Rock Island County.

The cause is brought to this court on a writ of error. The question involved and the only question discussed is the sufficiency of the information. In People vs. Nelson, 326, Ill. 98, [illegible] had

before us. We there held that the charge that the plaintiff in error did unlawfully possess intoxicating liquor is but the conclusion of the pleader. To the same effect see People vs Martin, 314 Ill. 110, and People vs. Barnes, 314 Ill. 140. In view of the rule announced in the cases above cited, it is clear that the information does not charge a violation of the Illinois Prohibition Act.

The judgment of the County Court of Rock Island County is reversed and the cause is remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

44 78

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

237 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On MAR 17 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Oscar W. Schneider,
Appellant,

vs.

Otto Neubert, Sam N. Wasley,
and Edward W. Spiegel,
Appellees.

Appeal from the Circuit
Court of Henry County.

237 I.A. 657

Jett, P. J.

This suit was instituted by Oscar W. Schneider, appellant, against Otto Neubert, Sam N. Wasley and Edward W. Spiegel, appellees, in the Circuit Court of Henry County, to recover money claimed to be due him upon a certain contract for the construction of a two story garage in Kewanee, in accordance with the plans and specifications prepared by an architect, the appellant agreeing to "use his best ability to get all materials and labor at the least possible cost for the construction of said building," appellees agreeing to pay "for the performance of the contract the total net cost of the labor and materials plus 10% commission on same."

The contract sets out in some detail the obligations of appellant under the contract, including the requirement that the "contractor shall maintain such insurance as will protect the owners from claims for damages for personal injuries."

At the trial in the Circuit Court before a jury a verdict was found for appellees, upon which judgment was rendered and appellant prosecutes this appeal.

This cause was before this court on a former occasion and is reported as Schneider vs Neubert, 226 Ill. App. 84; and was also in the Supreme Court and the opinion of said court will be found in the case of Schneider vs Neubert, 308 Ill. 40.

Since the said case has previously been in this court there is no occasion for a detailed statement of the facts.

The record discloses that the appellant provided the insurance mentioned in such contract and on October 4, 1921, shortly after the completion of the building he submitted an itemized statement of his account and there appeared among the items this one, "to liability

Oscar . Schneider,
Appellant,

vs.

Otto Neubert, Sam N. Wesley,
and Edward . Spiegel,
Appellees.

Appeal from the Circuit

Court of Henry County.

Jett, J. J.

This suit was instituted by Oscar . Schneider, appellant, against Otto Neubert, Sam N. Wesley and Edward . Spiegel, appellees, in the Circuit Court of Henry County, to recover money alleged due him upon a certain contract for the construction of a two garage in Kewanee, in accordance with the plans and specification prepared by an architect, the appellant agreeing to use his ability to get all materials and labor at the least possible for the construction of said building," appellees agreeing to "for the performance of the contract the total net cost of and materials plus 10% commission on same."

The contract sets out in some detail the obligations of under the contract, including the requirement that the "contr shall maintain such insurance as will protect the owners from for damages for personal injuries."

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Since the said case has previously been in this court there no occasion for a detailed statement of the fac .

The record discloses that the appellant provided the insurance mentioned in such contract and on October , 1921, shortly after completion of the building he submitted an itemized state

$923.22", which the parties all understood to be the amount of the premium paid for employers liability insurance. Appellees received this statement and made no objection to their liability for this item for a number of months.

When this cause was in the Supreme Court it was reversed, on account of an instruction that had been given by the plaintiff in the trial court. The effect of which instruction was to tell the jury that they were bound by the construction put upon the contract by the parties themselves.

The controversy in this case grows out of the following language found in the contract, "contractor shall maintain such insurance as will protect the owners from claims for damages for personal injuries." Appellees contend that appellant was to bear the expenses of the liability insurance, and it is the contention of appellant that it should be borne by appellees. The meaning of the word "maintain", as used in this contract and as understood by the parties to it is in dispute. Appellees insist that the word "maintain" as here used means to support, to bear expense of, while appellant insists that the word means to sustain, to keep up, not to suffer to fail or decline, to hold or preserve in a particular condition, to provide for, and that it is here used as a synonym of "keep" and "preserve." Since the word used in the contract is susceptible of different meanings the court permitted evidence of the particular interpretation, put upon it by the parties themselves before the suit was commenced.

Where the language of a written instrument is ambiguous or indefinite, the practical interpretation of the parties may be proved and is often entitled to great weight in arriving at the true intention. Armstrong Paint and Varnish Works vs. Continental Can Co. 301 Ill. 102; Schneider vs. Neubert, 308 Ill. 40-43.

Before the practical construction given the contract of the parties or evidence of other extrinsic facts is admissible the court must determine that the contract is ambiguous or incomplete. The meaning of language is always a question of fact, but if the words employed can be given but one meaning, if the meaning is so clear

that no reasonable man could reach more than one conclusion, it is the duty of the court to decide the question of fact for itself; but if the meaning of the writing is undertain or ambiguous and parol evidence is introduced in aid of its interpretation, and if, considering the language in the ~~xxxx~~ light of the parol evidence introduced, there remains a doubt of its meaning then the question of its meaning must be left to the jury. Carstens Packing Co. vs. Sterne and Sons Co. 286 Ill. 355; Schneider vs. Feubert 308 Ill. 40-43.

Where the language used leaves the true intention of the parties in doubt and it is necessary to receive evidence of extrinsic facts and circumstances to determine the intention of the parties, and if such extrinsic facts and circumstances are controverted, then the jury must determine the question of fact, what is the contract? Carstens Packing Co. vs. Sterne ' Sons Co. Supra.

For the reason that the word "maintain" has many different meanings and for the further reason that the association of the clause in dispute with other clauses in the contract renders the true intent of the parties uncertain, the meaning of the word is ambiguous, and the court properly received evidence of extrinsic facts and circumstances for the purpose of clarifying the meaning. Under this state of the record the court gave certain instructions. Appellant insists that the court erred in giving instructions 1-2-3 that were given on the part of appellees and in modifying instruction number 8 offered on the part of appellant.

By the first instruction given by appellees to which appellant takes exception, the court told the jury that the contract contained the provision, "Owners agree to pay the contractor for the performance of the contract the total net cost of labor and materials plus 10% commission on same," and then concludes as follows, "if you believe from the evidence and under the instructions given to you by the court that defendants have paid to the plaintiff the total net cost of all material and labor plus 10% commission on the same and that the charge for liability insurance made by the plaintiff is not warranted under the terms of the contract in evidence, then you should disallow

that no reasonable man could reach more than one conclusion, it is the duty of the court to decide the question of fact for itself; but if the meaning of the writing is uncertain or ambiguous and parol evidence is introduced in aid of its interpretation, and if, considering the language in the light of the parol evidence introduced, there remains a doubt of its meaning then the question of its meaning must be left to the jury. Carstens Packing Co. vs. Stearns and Some Co. 286 Ill. 355; Schneider vs. Seubert 308 Ill. 40-43.

Where the language used leaves the true intention of the parties in doubt and it is necessary to receive evidence of extraneous facts and circumstances to determine the intention of the parties, and if such extraneous facts and circumstances are conroverted, then the jury must determine the question of fact, what is the contract? Carstens Packing Co. vs. Stearns ' Some Co. Supra.

For the reason that the word "maintain" has many different meanings and for the further reason that the association of the clause in dispute with other clauses in the contract renders the true intent of the parties uncertain, the meaning of the word is ambiguous, and the court properly received evidence of the facts and circumstances for the purpose of clarifying the meaning. Under this state of the record the court gave certain instructions. Appellant insists that the court erred in giving instructions 1-4-5 that were given on the part of appellees and in modifying instruction number 2 offered on the part of appellant.

By the first instruction given by appellees to which appellant takes exception, the court told the jury that the contract contained the provision, "Owners agree to pay the contractor for the performance of the contract the total net cost of labor and materials plus 10 commission on same," and then concludes as follows, "If you believe from the evidence and under the instructions given to you by the court that defendants have paid to the plaintiff the total net cost of all material and labor plus 10% commission on the same and that the charge for liability insurance made by the plaintiff is not warranted under the terms of the contract in evidence, then you should disallow

said charge for insurance and so find by your verdict." This instruction does not submit to the jury the question as to what the contract is, but on the contrary leaves it to the jury to determine the legal effect of the contract.

Whether or not the charge of appellant for liability insurance is warranted under the terms of the contract depends only upon the legal effect of that instrument. It is the duty of the court, and not of the jury, to determine the legal effect of the contract and therefore it was the duty of the court to determine whether the charge for liability insurance was "warranted under the terms of the contract" and it was error to submit that question to the jury.

No question of fact is submitted to the jury by this instruction.

Appellees second instruction to which objection is made is to our minds erroneous for the jury is told by quoting from the contract the following words, "contractor should maintain such insurance as will protect the owners from claims for damages for personal injuries," and the instruction then tells the jury that even though they may believe from the evidence that plaintiff expended the sum of $925.22 for insurance, still if the jury further believe from the evidence that "under the provisions of the contract and the instructions of the court it was the business of the contractor Schneider to furnish said insurance without cost to the owners," then as to such item the jury should find for the defendants and disallow such charge.

It is quite apparent that before it can be determined whether it was the "business" of the contractor to furnish such insurance at his own cost the legal effect of the contract must be ascertained. In this instruction, as in the preceeding one, no question of fact is presented to the jury for its determination but a legal question only is submitted to them.

By the third instruction to which the appellant objects the jury was told as to the insurance item they were justified in refusing to allow the same, if they believed from the evidence that the defendants "were not legally and justly bound to pay and did not pay" such item.

It was the duty of the court to inform the jury under what con-

[illegible] "warranties." This instruction [illegible] as to what the contract is, but on it [illegible] to determine the legal effect of the contract.

Whether or not the charge of appellant for its liability insurance [illegible] of the contract depends only upon the [illegible] effect [illegible] the duty of the court, and not [illegible] the jury, to determine the effect of the contract and therefore it was the duty of the court to determine whether the charge for liability insurance was "warranted" [illegible] or the terms of the contract [illegible] and it was error to submit that question to the jury.

No [illegible]tion of fact is submitted to the jury by this instruction.

Appell[illegible] second instruction to which objection is made is to our mind erroneous for the jury is told by omitting from the contract the following words, "contractor should maintain such insurance as will protect the owners from claims for damages for personal injuries," and the instruction then tells the jury that even that [illegible] believe from the evidence that plaintiff expended the sum of $[illegible] for insurance, still if the jury further believe from the evidence that "under the provisions of the contract and the instructions of the court it was the business of the contractor solely to furnish said insurance without cost to the [illegible] then as to such item the jury should find for the defendants and disallow such charge.

It is quite apparent that [illegible] it can be determined whether it was the "business" of the contractor to furnish such insurance or his own cost the legal effect of the contract must be ascertained. In this instruction, as in the preceding one, no question of fact is presented to the jury for its determination but a legal question only is submitted to them.

By the third instruction to which its [illegible] objection was told as to the insurance item they were instructed in substance to allow the same, if they believed from the evidence that the defendant "were not legally and justly bound to pay

ditions appellees were not "legally and justly bound to pay" the insurance item, because to determine that question the legal effect of the contract must necessarily be determined and it was clearly beyond the province of the jury to settle the question of law.

It is said by appellees that if instructions 1, 2, & 3 are erroneous, then appellant has fallen into the same error in the giving of instructions 2, 3, 4 and 5, on the part of appellant.

With this contention we cannot agree. Said instructions 2, 3, 4 and 5 do not, nor does any of them, leave it to the jury to determine the legal effect of the contract. We do not think that the modification of instruction number 8 offered by appellant, was prejudicial to his interests.

It is insisted by appellant that the court committed reversible error in striking from the record on motion of appellees exhibit 4. Exhibit 4 is the statement of account a copy of which was sent to the appellees and received by them.

The testimony discloses that conversations were had by appellant and appellees relative to said exhibit and they were admissible in evidence. In the light of the record we can see no good reason for the striking of exhibit 4, but if this was the only error we would not be inclined to reverse the case.

We are of the opinion that reversible error was committed in the trial of the case and the judgment of the circuit court of Henry County will be reversed and the cause remanded which is accordingly done.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

W. H. Lowe,

Appellee

vs.

M. Huber,

Appellant.

Certificate Denied

Appeal from the Circuit Court of Kankakee County.

237 I.A. 657

Jett, P. J.

Appellee, W. H. Lowe, commenced this suit in the Circuit Court of Kankakee County, against M. Huber, the appellant, to recover a sum of money he claimed to be due him under a contract of employment. The case is one in assumpsit, and the declaration consists of the common counts, On motion of appellant appellee was ruled to file a bill of particulars. The bill of particulars is that appellee claimed a salary from February 1, 1921 to January 3, 1922, a period of eleven months at Two Hundred Dollars per month. Appellant filed the general issue and an affidavit of merits verified. In his affidavit of merits appellant claims that on or about February 1, 1919, he entered into a contract with appellee for the supervision of his farm and that the services of appellee were to be paid for at the rate of Fifty Dollars per month, and he had paid appellee all money due him under said contract and that there was never at any time any other contract, and he did not promise to pay appellee at the rate of Two Hundred Dollars per month. At a subsequent term of court appellant filed an amended verified affidavit of merits in which he stated the mature of his defense was, that on or about the first day of February, 1919, he entered into a contract with appellee for the supervision of his farm, the services to be paid for at the rate of Fifty Dollars per month; that he voluntarily, as the time progressed, raised the amount of appellee's salary until it reached for several months the sum of Two Hundred Fifty Dollars per month; that on or about the first day of March 1921, appellant became ill and was in a hospital and had had business reverses so that he could not pay as much for the services of the appellee as he had paid in the past, and the supervision of the

farm would not take as much time as in the past; that he told appellee of his financial difficulties and advised him that a retrenchment of his finances would be necessary, and in substance appellee replied he was satisfied to take less salary for his services and perfectly willing to continue as he had been, leaving the appellant to pay him whatever salary appellant should deem just and right; that on or about the third day of January 1922, at the time appellee left the employ of appellant, he asked appellee, to render to him a statement of what was owing to him for money expended on behalf of appellant by appellee for repairs, and for extra work done, and appellee rendered appellant a statement of the expenditures, which said expenditures appellant paid; that on or about the fifth day of July 1922, he received a statement from appellee demanding pay for his services from February 1, 1921 to January 3, 1922, and asking for compensation at the rate of Two Hundred Dollars per month; that he dows not remember there was any verbal agreement entered into in which he promised appellee the sum of Two Hundred Dollars per month;

A jury trial was had and the jury returned a verdict for Sixteen Hundred Dollars in favor of appellee and against the appellant, on which verdict judgment was rendered and appellant prosecutes this appeal. A number of errors are assigned by the appellant for the reversal of the judgment.

It is the contention of appellee that about the month of February 1919, appellant came to the home of appellee and engaged him to assume the management of his farm and that thereupon a verbal contract was entered into; that he went into the employment of appellant and remained until the third day of January 1922; that in April 1920 a new contract was made and a new schedule of wages agreed upon, namely, of Two Hundred Dollars a month; that about the first of October 1920, appellant voluntarily increased his wages to Two Hundred Fifty Dollars per month which increased payment continued until about February 1, 1921; that during all this period of time after April 1920, appellee devoted his entire time and a large portion of the time of his own employees to the operation and management of appellant's farm, and the

management of a packing plant in which appellant was interested, and that much of the farm equipment used in the operation of appellant's farm was the property of appellee. No dispute is made by appellant of any services performed by appellee during the time he was so employed, and it appears that the only real contention advanced by appellant is whether or not a new contract was entered into between the parties.

No denial was made on the part of the appellant of the services performed by appellee during the last period of eleven months in which he continued in the employ of appellant. It is the contention of appellant that no contract was entered into in April 1920, or at any time by which he agreed to pay appellee Two Hundred Dollars per month; that if such a contract was entered into it was rescinded or at least altered and amended in September or October 1920, when the salary of appellee was increased to Two Hundred Fifty Dollars per month; that during the conversation in the hospital in Chicago in February 1921, the minds of the parties met on the proposition that from then on the salary of appellee would be less than he had been receiveing; that no definite amount of salary to be thereafter paid to appellee was agreed upon but was left to appellant; that this action together with the subsequent course of conduct adopted by the parties rescinded any contract of employment then existing between the parties, and left appellee in a position of an employee performing services without any definite agreement as to the amount of salary he was to receive; the amount of appellee's salary was never thereafter fixed or determined; from February 1, 1921 to January 5, 1922, appellee was not working under a contract for a definite salary per month.

It is insisted by the appellant that the court admitted in evidence on behalf of appellee testimony showing what was done on the farm of appellant prior to the time for which the salary was claimed. No proper exception to the admission of this testimony was preserved, and in addition thereto at the instance of appellant, the court instructed the jury that there could be no recovery for any such work and that the rights of the parties depended upon the contract in force

[illegible] agreement of a pecuniary nature in which appellant was interested, and that much of the farm equipment used in the operation of appellant's farm was the property of appellee. No dispute is made by appellant that any services performed by appellee during the time he was employed, and it appears that the only real contention advanced by appellant is whether or not a new contract was entered into between the parties.

No denial was made on the part of the appellant of the services performed by appellee during the last period of eleven months in which he continued in the employ of appellant. It is the contention of appellant that no contract was entered into in April 1920, or at any time by which he agreed to pay appellee Two Hundred Dollars per month. If such a contract was entered into it was rescinded or at least altered and amended in September or October 1920, when the salary of appellee was increased to Two Hundred Fifty Dollars per month; that during the conversation in the hospital in Chicago in February 1921, the minds of the parties met on the proposition that from then on the salary of appellee would be less than he had been receiving; that no definite amount of salary to be thereafter paid to appellee was agreed upon but was left to appellant; that this action together with the subsequent course of conduct adopted by the parties rescinded any contract of employment then existing between the parties, and left appellee in a position of an employee [illegible] definite agreement as to the amount of [illegible] amount of appellee's salary was never thereafter fixed or determined; from February 1, 1921 to January 1, 1922, appellee was not working under a contract for a definite salary per month.

It is insisted by the appellant that the court admitted in evidence on behalf of appellee testimony showing what was done [illegible] farm of appellant prior to the time for which the salary was claimed. No proper exception to the admission of this testimony was preserved, and in addition thereto at the instance of appellant, the court instructed the jury that there could be no recovery for any such work [illegible]

during the period, if any, from February 1, 1921 to January 3, 1922. Appellant complains of instruction number one given on the part of appellee. This instruction was on the theory of the case of appellee based upon the evidence offered by him. We are not prepared to say that this instruction was calculated to in any way mislead the jury. When considered in connection with the instructions given on the part of the appellant, it is clear to our minds that the jury was fully informed as to the issue upon which they were called to decide. Complaint is made of a statement of the court in the presence of the jury that the evidence showed, "That some contract was entered into between the parties." It is insisted that this amounted to telling the jury the contract contended for by appellee was really entered into. We are of the opinion that the statement of the court was not broad enough for the jury to receive that impression. The remarks of the court can not be regarded as prejudicial because there is no question but what a contract of some kind existed between appellant and appellee; if not an express contract, it was an implied one.

The affidavit of merits filed by appellant admits they entered into a contract. Furthermore, by instruction five, given at the request of appellant, the court instructed the jury "That it is agreed that there is no dispute as to either services or compensation prior to February 1, 1921, and in arriving at your verdict you can only take into consideration what the contract price per month was for the period from February 1, 1921, to January 3, 1922." It will, therefore, be seen that the court at the request of appellant, instructed the jury that there was a contract and the only question was what was the contract price? The discussion of the various errors assigned by appellant covers a broad field. In our opinion no reversible error was committed in the giving or refusing of instructions. A verdict will not be set aside on the ground that it is not supported by the evidence unless it is manifestly against the weight of the evidence. The question of fact involved in this case was peculiarly one for a jury, and we are not prepared to say that the verdict of the jury is manifestly against the weight of the evidence. It is insisted

[illegible]

ng the period, if any, from February 1, 1921 to January 5, 1922.

[illegible] last complaint of instruction number one given on the part of [illegible] appellee. This instruction was on the theory of the [illegible] of appellee based upon the evidence offered by him. We are not [illegible] to say that this instruction was calculated to in any way mislead the jury. When considered in connection with [illegible] instructions given on the merit of the appellant, it is clear to our minds that the jury was fully informed as to the issue upon which they were called to decide. Complaint is made of a statement of the court in the presence of the jury that the evidence showed, "that some con ract was entered into between the parties." It is insisted that this amounted to telling the jury the contract contended for by appellee was really entered into. We are of the opinion that the statement of the court was broad enough for the jury to receive that impression. The remark of the court can not be regarded as prejudicial because there is no [illegible] in fact what a contract of some kind existed between appellant and appellee; if not an express contract, it was an implied [illegible].

The affidavit of merits filed by appellant admits they entered into a contract. Furthermore, by instruction five, given at the request of appellant, the court instructed the jury "that it is agreed that there is no dispute as to either services or compensation prior to February 1921, and in arriving at your verdict you can only [illegible] into consideration what the contract price per month was for the period from February 1, 1921, to January 5, 1922.

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The question of fact involved in this case was peculiarly one for jury, and we are not prepared to say that the verdict of the jury is

by appellee that this court is not called upon by reason of the condition of the record, to pass upon the merits of this cause. It appears from the abstract that the appellant was allowed thirty days in which to file a bond and sixty days to present a bill of exceptions. Nowhere in the abstract does it appear, when the bond was presented and approved, or when the bill of exceptions was presented. It further appears from the abstract that a motion for a new trial was filed but said abstract fails to disclose the grounds alleged for new trial. The abstract discloses the following:--"Order of court denying defendant's motion for a new trial. Exception by defendant. Judgment on verdict in favor of the plaintiff and against the defendant. Exception by defendant."

Notwithstanding the contention of the appellee in this respect we have considered this cause on its merits. We conclude therefore, that no reversible error was committed by the trial court and the judgment of the Circuit Court of Kankakee County will be affirmed.

Judgment Affirmed.

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[illegible] Exceptions [illegible]

[illegible]nt on verdict in favor of the plaintiff and against the defendant. Exception by defendant."

Now, understanding the contention of the appellee in this respect we have considered this cause on its merits. We conclude therefore, that no reversible error was committed by the trial court and the judgment of the Circuit Court of Monroe County will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 2 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

David R. Forgan, et al,

Plaintiffs in error,

vs. Error to Rock Island.

William H. Leithner, et al,

Defendants in error.

237 I.A. 657

Jett, P. J.

The defendants in error, William H. Leithner and John A. Weishar were electrical dealers and contractors doing business under the firm name and style of Leithner and Weishar. On September 16, 1922, they entered into an agency contract with the Burns-Pollock Electric Manufacturing Company and at the same time ordered from it several Capitol Talking Machines and records and executed in payment therefor six notes aggregating $1175.30. Five of these notes were for the sum of $216.00 and were due respectively two, three, four, five and six months after date. The sixth note was for $95.30 and due seven months after date. Each note provided that in case of default the makers agreed to pay reasonable attorney fees. The Burns-Pollock Electric Manufacturing Company agreed that if the sales of defendants in error did not amount to $1175.30 it would pay defendants in error the difference in cash or repurchase the machines if returned in good order providing defendants in error furnished fifty names and addresses of persons who might be interested in securing talking machines. Under this agreement the several machines which defendant in error ordered were shipped, only a portion, however, were sold and three of the machines and two defective motors were returned and credit memorandums aggregating $543.00 were issued to defendants in error by the Burns-Pollock Electric Manufacturing Company.

On September 22, 1922 plaintiffs in error purchased these notes of the Burns-Pollock Electric Manufacturing Company paying therefor seventy-six (76) per cent of their face value in accordance with the provisions of an agreement entered into by and between the Burns-Pollock Electric Manufacturing Company and plaintiffs in error on

Torgeson, et al.,

Plaintiffs in error,

vs.

Error to Cook Island.

William H. Leithner and John

Weiabel were electrical dealers and contractors

the firm name and style of Leithner and Weiabel. On 8

1922, they entered into an agency contract with the Burns-Pollock

Electric Manufacturing Company and at the same time ordered from

it several Capitol Talking Machines and records and executed in

payment therefor six notes aggregating $1175.50. Five of these

notes were for the sum of $216.00 and were

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fees. The Burns-Pollock Electric Manufacturing Company agreed that

if the sales of defendants in error did not amount to $1175.50 it

would pay defendants in error the difference in cash [illegible] remember

the machines if returned in good order providing [illegible] memoranda in error

furnished fifty names and addresses of persons who might be interested

in securing talking machine. Under this agreement [illegible] several

machines which defendant in error ordered were shipped, only a portion,

however, were sold and three of the machines and two

were returned and credit memorandums aggregating $648.00

to defendants in error by the Burns-Pollock Electric Manufac

Company.

On September 22, 1922 plaintiffs in error purchased

of the Burns-Pollock Electric Manufacturing Company [illegible]

February 9, 1922. The note which matured November 16, 1922 and the one which matured December 16, 1922 were each paid by defendants in error at maturity and the other four not having been paid, this suit was instituted by plaintiffs in error to recover thereon.

To the declaration defendants in error filed two pleas, one denying the endorsement, the other averred the collection of $543.00 by the Burns-Pollock Electric Manufacturing Company upon the notes sued on which fact plaintiffs in error well knew and that plaintiffs in error were not holders of said notes in due course but took them subject to the payments thereon by the defendant in error. Upon these pleas issued were joined and a trial resulted in a verdict in favor of the plaintiffs in error for $211.84 for principal and interest and $40.00 for attorney fees. Upon which, after overruling a motion for a new trial, judgment was rendered and plaintiffs in error bring the case to this court by writ of error.

Plaintiffs in error, at the close of all the evidence tendered to the court an instruction directing the jury to return a verdict in their favor for an amount equal to seventy-six per cent of the total principal and interest due on the notes admitted in evidence together with reasonable attorney fees. It was the contention of the plaintiffs in error in the trial court and it is their contention here that under the uncontradicted evidence in the record plaintiffs in error were the owners and holders of the notes in due course and that their peremptory instruction should have been given; that the record presents no disputed questions of fact and that the instructions given on behalf of defendants in error were not based upon any competent evidence in the record.

The agreement entered into between the Burns-Pollock Electric Manufacturing Company and the plaintiffs in error on February 9, 1922, by the terms and provisions of which plaintiffs in error became the owner and holder of the notes sued on is too long to set forth in detail in this opinion, it provides, however, that plaintiffs in error were to be permitted to receive remittances at the office of

January 9, 1922. The note which matured November 16, 1922 and the one which matured December 16, 1922 were each paid by defendants in error at maturity and the other four not having been paid, this suit was instituted by plaintiffs in error to recover thereon.

To the declaration defendants in error filed two pleas, one denying the endorsement, the other averred the collection of $542.00 by the Burns-Pollock Electric Manufacturing Company upon the notes sued on which fact plaintiffs in error well knew and that plaintiffs in error were not holders of said notes in due course but took them subject to the payments thereon by the defendant in error. Upon these pleas issue were joined and a trial resulted in a verdict in favor of the plaintiffs in error for $211.84 for principal and interest and $100.00 for attorney fees. Upon which, after overruling a motion for a new trial, judgment was rendered and plaintiffs in error bring the case to this court by writ of error.

Plaintiffs in error, we be lieve, if all the evidence tendered to the court an instruction directing the jury to return a verdict in their favor for an amount equal to seventy-six per cent of the total principal and interest due on the notes admitted in evidence together with reasonable attorney fees. It was the contention of the plaintiffs in error in the trial court and it is their contention here that under the uncontradicted evidence in the record plaintiffs in error were the owners and holders of the notes in due course and that their peremptory instruction should have been given; that the record presents no disputed questions of fact and that the instructions given on behalf of defendants in error were not based upon any competent evidence in the record.

The agreement entered into between the Burns-Pollock Electric Manufacturing Company and the plaintiffs in error on February 1, 1921, by the terms and provisions of which plaintiffs in error became the owner and holder of the notes sued on is too long to set forth in detail in this opinion. It provides, however, that plaintiffs in error were to be permitted to receive remittances at the office of

the Burns-Pollock Electric Manufacturing Company and to inspect, audit, check and make extracts from the books, accounts, records, orders, original correspondence and other papers of said Company relating to accounts sold thereunder; that the Burns-Pollock Electric Manufacturing Company was to transmit and deliver to plaintiffs in error all checks received by it in payment of accounts and plaintiffs in error placed at the disposal of the Burns-Pollock Electric Manufacturing Company its collection department, its credit department, its auditor, its general counsel for the purpose of securing legal advise as to any sales contract and the Burns-Pollock Electric Manufacturing Company designated certain officers of plaintiffs in error to receive, open and dispose of all mail addressed to it and to endorse its name upon all notes, checks and drafts or upon any invoice or bills of lading relating to any of its accounts, and it was in pursuance of this authority that the note clerk of plaintiffs in error endorsed upon the notes sued on the name of the said Burns-Pollock Electric Manufacturing Company, The evidence disclosed that the other two notes of this series of notes,, which were paid by defendants in error at maturity were never endorsed and in the letter demanding payment upon the notes sued on defendants in error were advised by plaintiffs in error that if they preferred to make their check payable to the Burns-Pollock Electric Manufacturing Company they would be fully protected by such payment.

From a careful reading of this agreement and from all the evidence we are unwilling to disturb the finding of the jury to the effect that plaintiffs in error not only had notice of all the transactions between the Burns-Pollock Electric Manufacturing Company and defendant in error but acquiesced therein and should be bound thereby.

The only objection made to the instructions given on behalf of defendants in error is that they are not based upon the competent evidence in the record. In our opinion the court properly admitted the evidence offered on behalf of defendants in error with reference to the return by defendants in error of the unsold machines and defective motors and the credit therefor by the Burns-Pollock Electric

[illegible] ...ity, obtain and make extracts from the books, accounts, records, [illegible]ers, original correspondence and other papers of said Company relating to accounts and thereunder; that the Burns-Pollock Electric Manufacturing Company [illegible] to transmit and deliver to plaintiffs in error all checks received by it in payment of and plaintiffs in error placed at the disposal of the Burns-Pollock Electric Manufacturing Company its collection department, its credit department, its auditor, its general counsel for the purpose of securing legal advice as to any sales contract and the Burns-Pollock Electric Manufacturing Company designated certain officers of plaintiffs in error to receive, open and dispose of all mail addressed to it and to endorse its name upon all notes, checks and drafts or upon any invoice or bills of lading relating to any of its accounts, and it was in pursuance of this authority that the note clerk of plaintiffs in error endorsed upon the notes sued on the name of the said Burns-Pollock Electric Manufacturing Compa[illegible] disclosed that the other two notes of this series of notes, which were paid by defendants in error at maturity were never endorsed and in the letter demanding payment upon the notes sued on defendants in error were advised by plaintiffs in error [illegible] if they preferred to make their check payable to the Burns-Pollock Electric Manufacturing Company they would be fully protected by such payment.

From a careful reading of this agreement and from all the evidence we are unwilling to disturb the finding of the jury to the effect that plaintiffs in error not only had notice of all the transactions between the Burns-Pollock Electric Manufacturing Company and defendant in error but acquiesced therein and should be bound thereby.

The only objection made to the instructions given on behalf of defendants in error is that they are not based upon the competent evidence in the record. In our opinion the court properly admitted the evidence offered on behalf of defendants in error with reference to the return by defendants in error of the small machines and [illegible]tive motors and the credit therefor by the Burns-Pollock Electri

Manufacturing Company, and therefore these instructions are not subject to the only criticism directed against them.

The verdict represents the difference between the aggregate amount of the notes sued on and the amount credited defendants in error by the Burns-Pollock Electric Manufacturing Company upon the return of machines and defective motors, together with $11.84 interest and $40.00 attorney fees. The verdict is right and the judgment rendered thereon is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Martha Welliver,

Appellee,

vs

A. F. Cashmore,

Appellant,

Jett, P. J.

Appeal from the Circuit Court of McHenry County.

237 I.A. 657

This is a suit instituted by Martha Welliver, appellee, before a justice of the peace in McHenry County, against A. F. Cashmore, appellant, to recover damages for a failure of the appellant to do the work of kellastoning a house owned by appellee in Woodstock, in said county of McHenry, according to the terms of a contract entered into between appellee and appellant. The appellant did not appear before the justice of the peace and a judgment was rendered in favor of appellee for the sum of $300.00, from which the appellant appealed to the circuit court of McHenry county where the case was tried before a jury and a finding was had in favor of appellee in the sum of $200.00 on which judgment was rendered and appellant prosecutes this appeal.

It appears from the evidence that appellant agreed to furnish the material and to do the work of kellastoning the house of appellee for the sum of $350.00. The material was furnished and the work done in the month of July 1919.

It is the contention of appellee that in the spring of 1920 defects in the work were discovered and that the kellastoning began to drop off from the house in different places; that she went to see the appellant about having it fixed over and that in March 1923, appellee demanded from appellant that he do the work according to his agreement. Upon the refusal of appellant to do the work suit was instituted with the result as aforesaid.

It is the contention of appellant that the verdict of the jury is clearly against the manifest weight of the evidence, and that the court imporperly instructed the jury relative to the measure of damages.

We have examined the evidence offered on the part of the respective parties to this proceeding. The jury heard the contention of the litigants and were the judges of the weight and credit to be attached to the testimony that was permitted to be heard by them. On the questions of fact the jury found in favor of appellee and we are not prepared to say that their finding is manifestly against the weight of the evidence.

On the question of the measure of damages a more serious question arises. It is undisputed that appellee paid the appellant $350.00 to furnish the material and perform the labor of kellastoning her house. It was incumbent upon him to do the work in a workman-like manner. It is quite apparent from what is disclosed by the record in this proceeding that the work appellant agreed to do was not done in a workman-like manner. It will be remembered that appellee is not claiming damages to the house, that her claim is for a failure to properly apply the material. The evidence shows that the material except the laths used was a total loss by reason of the manner in which the work was done.

It is the contention of appellant that there is no evidence upon which to base a verdict of damages. The evidence shows the cost of putting on the kellastoning is $1.75 per square yard. It further shows the dimensions of the house and it discloses that the defects in the work were of such a nature that it would all have to be done over. These facts are all undisputed in this record. The court instructed the jury that the appellee was entitled to recover such sum as is shown by the evidence will compensate her for the damages which she had sustained by reason of said kellastoning not being mixed and applied in a workman-like manner not to exceed the sum of $308.75. Taking into consideration the testimony we are of the opinion that this instruction did not mislead or prejudice the rights of appellant. While the instructions may not technically be correct there is nothing about them calculated to work an injury to appellant. Taking the entire record as we find it, it appears

tion of the litigants and were the judges of the weight and credit to be attached to the testimony that was permitted to be ma[illegible] them. On the questions of fact the jury found in favor of [illegible] and we are not prepared to say that their finding is manifestly against the weight of the evidence.

On the question of the measure of damages a more serious [illegible] question arises. It is undisputed that appellee paid the sum [illegible] $350.00 to furnish the material and perform the labor of kalisetoning her house. It was incumbent upon him to do the work in a workmanlike manner. It is quite apparent from what is disclosed by [illegible] record in this proceeding that the work appellant agreed to [illegible] not done in [illegible] the manner. It will be remembered that [illegible] manner in which the work was done.

It is the contention of appellant that there is no evidence upon which to base a verdict of damages. The evidence s[illegible] the cost of putting on the kalisetoning is $1.75 per square yard. It further shows the dimensions of the house and it discloses that the defects in the work were of such a nature that it would [illegible] have to be done over. These facts are all undisputed in this record. The court instructed the jury that the appellee was entitled to recover such sum as is shown by the evidence will compensate her for the damages which she had sustained by reason of said kalisetoning not being mixed and applied in a [illegible] manner not to exceed the sum of $308.75. Taking into consideration the test[illegible] of the opinion that this instruction did not mislead or prejudice the rights of appellant. While the instruction may not technically be correct there is nothing about them calculated to work [illegible] in[illegible] [illegible] Taking the entire record as we find it, it appears

to us that substantial justice has been done between the parties, therefore, the judgment of the circuit court of McHenry County will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

44 Gal

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

237 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

W. H. Rogers,

Appellee,

vs

Kipp's Express & Van Company,

a corporation,

Appellant.

Appeal from the Circuit Court of Kankakee County.

237 I.A. 658

Jett, P. J.

This suit was brought in the Circuit Court of Kankakee County by W. H. Rogers, appellee, against Kipp's Express and Van Company, a corporation, appellant, for damages appellee claims to have sustained by reason of a truck of appellant colliding with his car. A jury trial was had and a verdict was rendered in favor of appellee in the sum of $400.00. Judgment was rendered on said verdict from which appellant appeals.

It appears that on January 18, 1923, about 6:30 o'clock in the morning and before daylight, appellee was travelling in a northerly direction on Evergreen Avenue in the City of Kankakee, with the intention of turning west on Court Street. A truck belonging to appellant with a load of about 7000 pounds was going east on Court Street approaching Evergreen Avenue. As appellee came northin his automobile a street car was going west and was approaching said Evergreen Avenue. Appellee stopped his automobile to let the street car go by and while his car was so standing he claims it was struck by the truck of appellant. At the time of the collision there were no lights burning on the truck. The trial resulted as above indicated.

Appellant seeks a reversal of the judgment and assigns the following reasons therefor; that the verdict is contrary to the law and the evidence; that appellee was guilty of contributory negligence in cutting the corner at the street intersection and for that reason he was directly responsible for the collision; that the trial court improperly allowed appellee to give testimony of statements made to him by the driver of the truck in the absence of proof showing that said statements were part of the res gestae; that the

vs.

Appeal from the Circuit

Court of Yankee County.

Kipp's Express & Van Company,

a corporation,

Appellee.

Jett, J. 1.

This suit was brought in the Circuit Court of Yankee County by . Y. Rogers, appellee, against Kipp's Express and Van Company, a corporation, appellant, for damages appellee claim to have sustained by reason of a truck of appellant colliding with his car. A jury trial was had and a verdict was rendered in favor of appellee in the sum of $400.00. Judgment was rendered on said verdict from which appellant appeals.

It appears that on January 14, 1928, about 6:30 o'clock in the morning and before daylight, appellee was travelling in a northerly direction on Evergreen Avenue in the city of Yankee with the intention of turning west on Cora Street. At the same time appellant with a load of about 7000 pounds was going east on Cora Street approaching Evergreen Avenue. As appellee approached the intersection of Cora Street and Evergreen Avenue, appellee stopped his automobile to let the street car go by and while his car was so standing he claims it was struck by the truck of appellant. At the time of the collision there were no lights burning on the truck. The trial resulted as above indicated.

Appellant seeks a reversal of the judgment on the following reasons therefor: that the verdict is against the law and the evidence; that appellee was guilty of contributory negligence in cutting the corner at the street intersection, and for that reason he was directly responsible for the collision; that the trial court improperly allowed appellee to give hearsay of statements made to him by the driver of the truck in the absence of proof showing that said statements were part of the res gestae; that the

evidence of appellee in reference to his damages fails to show that the repairs, and labor were necessary by reason of the collision and for this reason the evidence is insufficient to sustain the verdict.

Appellant makes no complaint in its argument of any error being made in the giving of instructions on the part of appellee nor the failure to give instructions on the part of appellant.

The questions to be determined by this court are whether or not the Court erred in the admission of evidence on the part of appellee and is the verdict of the jury manifestly against the weight of the testimony. That the driver of the truck of appellant was driving without lighted lamps at the time of the collision, which was before sunrise on a cloudy and gloomy morning, is uncontradicted. This was contrary to the provisions of the statute. Section 16 of the Motor Vehicle Act. The record discloses that the driver of the truck testified he saw the automobile of appellee, 50 feet south of Court Street when he was about 75 or 100 feet west of Evergreen Avenue. It was his duty, therefore, to stop and give the right of way to appellee approaching from his right. Section 33 Motor Vehicle Law. Appellant insists that appellee in turning at the intersection of the two streets in question, cut the corner and in so doing ran into the truck. Appellee denies this and it was a question of fact for the jury to pass upon.

Appellee testified to a conversation with the driver of the truck concerning the manner in which the collision occurred and that he asked him why he did not stop and he replied that he could not that the brakes would not hold and that he had such a load he would have tipped over. Appellee further testified that he asked the driver of the truck why he did not have the lights on and the driver said he did not need them. In our opinion this conversation was not a part of the res gestae as insisted by appellee, but the substance of the conversation was testified to by the driver of the truck and no reversible error was committed in allowing appellee to testify in

[illegible] in reference to his damages fails to show that [illegible]

[illegible]

[illegible]nt makes no complaint in itsargument of any error [illegible] [illegible]ge to give instructions on the part of appellant.

The questions to be determined by this court are whether or not [illegible] court erred in the admission of evidence on the part of appellee [illegible]

[illegible] That the driver of the truck of [illegible] without lighted lamps at the time of the collision, which was be[illegible] sun[illegible]se on a cloudy and gloomy morning, is uncontradicted. This was contrary to the provisions of the statute. Section 16 of the Motor Vehicle Act. The record discloses that the driver of the truck testified he saw the automobile of appellee, 50 feet south of Court Street when he was about 75 or 100 feet east of Evergreen Avenue. It was his duty, therefore, to stop and give the right of way to appellee approaching from his right. [illegible] Motor Vehicle Law. Appellant insists that appellee in turning at the intersection of the [illegible] streets in question, cut the corner and in so doing ran into the truck. Appellee denies this and it was a question of fact for the jury to pass upon.

Appellee testified to a conversation with the driver of the truck concerning the manner in which the collision occurred and that he asked him why he did not stop and he replied that he could not [illegible] that the brakes would not hold and that he had [illegible] he would have tipped over. Appellee further testified that he asked the driver of the truck why he did not have the lights on and the driver said he did not need them. In our opinion this conversation was

this respect.

As to the question of damages there is sufficient evidence in the record upon which to base the finding. We are not prepared to say that the verdict is manifestly contrary to the weight of the testimony. The jury saw and heard the witnesses and observed them while so testifying and we are not inclined to disturb the finding of the jury. Substantial justice has been done. The judgment of the Circuit Court of Kankakee County will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

237 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Alice Watson,

Appellant,

vs

George LaFollette &

J. H. Savage,

Appellees,

Appeal from the

Circuit Court of

Peoria County.

237 I.A. 658

Jett, P. J.

This suit was instituted by appellant against appellees for false imprisonment. A trial was had and the jury returned a verdict in favor of appellees and appellant prosecutes this appeal.

It appears that one Alice Dawson made a complaint before J. H. Savage, Police Magistrate of the village of Brimfield, against appellant for assulting one Gerald Rhinehardt with a pitchfork. The Police Magistrate issued a warrant upon the complaint directed to the constable of said village or any constable of Peoria County for the apprehension of appellant. Pursuant to the warrant appellee LaFollette village constable apprended appellant and took her before the Police Magistrate Savage, one of the appellees. Appellant resisted and acted in a violent manner and by reason of her conduct she was incarcerated for a short time to allow her to quiet down before a hearing would be had. She remained a short time in the calaboose until her brother and some other friends interceded in her behalf. It was suggested by her friends that they would see that she went home if released. Appellant was thereupon released from the calaboose and was discharged, the suit having been dismissed. A trial was had as above indicated.

In her argument appellant relies upon the following reasons for a reversal of the cause; that the warrant for the arrest of the appellant was a nullity in the hands of appellee George LaFollette; that the commitment of the appellant in the village calaboose was without authority of law; that the verdict and judgment were contrary to the manifest weight of the evidence and that the court admitted improper evidence on behalf of appellee. The contention of

Appeal from the
Circuit Court of
Peoria County.

George LaFollette &
J. H. Savage,
Appellees.

v.

Jett, J. J.

This suit was instituted by appellees against appellee for false imprisonment. A trial was had and jury returned verdict in favor of appellees and appellant prosecutes this appeal.

It appears that one Alice Dawson made a complaint before J. H. Savage, Police Magistrate of the village of Brimfield, against appellant for assaulting one Gerald Rhinehardt with a pitchfork. The Police Magistrate issued a warrant upon the complaint directed to the constable of said village or any constable of Peoria County for the apprehension of appellant. Pursuant to the warrant appellee LaFollette village constable apprehended appellant and took her before the Police Magistrate Savage, one of the appellees. Appellant resisted and acted in a violent manner and by reason of her conduct she was incarcerated for a short time to allow her to quiet down before a hearing would be had. She remained a short time in the calaboose until her brother and some other friends interceded on her behalf. It was suggested by her friends that she should see that she went home if released. Appellant was thereupon released from the calaboose and was discharged, the suit having been dismissed. A trial was had as above indicated.

In her argument appellant relies upon the following reasons for a reversal of the cause; that the warrant for [illegible] the appellant was a nullity in the hands of appellee [illegible]; that the commitment of the appellant in the [illegible] without authority of law; that the verdict and judgment were contrary to the manifest weight of the evidence and [illegible] admitted improper evidence on behalf of appellee. The contention of

appellant that the warrant was a nullity and could not be served by the village constable in our opinion is not well founded. It appears to us that appellant has misapprehended the force and effect of the warrant issued by the Police Magistrate upon which the appellant was arrested. The warrant reads as follows:

> State of Illinois,
> County of Peoria,
> Village of Brimfield.
>
> The People of the State of Illinois, to the Village Constable of said Village or any Constable of Peoria County---Greeting:
>
> Whereas, complaint has been made by Mrs. Alice Dawson, before the undersigned, Police Magistrate of said Village, that Alice Watson has violated the provisions of an Ordinance of said Village by appearing on the streets with a pitchfork and assaulting one Gerald Rhinehart, in the Village and County aforesaid.
>
> These are, therefore, to command you forthwith to apprehend the said Alice Watson and bring her before me, at my office, to answer the said complaint, and further to be dealt with according to law and the Ordinances of said Village. Given under my hand and seal at the Village of Brimfield this 3rd day of June, A. D. 1919.
>
> J. H. Savage,
> Police Magistrate.

It will be seen therefore that the warrant was directed to the village constable of the Village of Brimfield or to any constable of Peoria County. It is clear to our minds that there is nothing in the contention of appellant that the warrant was null and void and that the village constable had no authority to execute the same.

The record discloses that the village constable met the appellant on the street about seven o'clock in the evening and notified her that he had a warrant for her arrest. She vigorously protested against the warrant being read to her and insisted on going home. She was taken by the village constable before appellee Savage, the Police Magistrate. Appellant became violent and abusive and dared the officer to lock her up. The Police Magistrate ordered her locked up and she remained in the village calaboose for a short time. Her brother and her friends appeared and it was agreed between them and the village authoritities that she be released

[illegible] until not be served by the village constable in our opinion is not well founded. It seems to us that appellant has misapprehended the force and effect of the warrant issued by the Police Magistrate upon which the appellant was arrested. The warrant reads as follows:

State of Illinois,
County of Peoria,
Village of Brimfield.

The People of the State of Illinois, to the Village Constable of said Village or any Constable of Peoria County---Greeting:

Whereas, complaint has been made by Mrs. Alice Dawson, before the undersigned, Police Magistrate of said Village, that Alice Watson has violated the provisions of an Ordinance of said Village by [illegible]ing on the streets with a pistol about and assaulting one Gerald Rhinehart, in the Village and County aforesaid.

These are, therefore, to command you forthwith to apprehend the said Alice Watson and bring her before me, at my office, to answer the said complaint, and further to be dealt with according to law and the Ordinances of said Village. Given under my hand and seal at the Village of Brimfield this 3rd day of June, A. D. 1919.

J. H. Savage,
Police Magistrate.

It will be seen therefore that the warrant was directed to the village constable of the Village of Brimfield or any constable of Peoria County. It is clear to our minds that there is nothing in the contention of appellant that the warrant was null and void and that the village constable had no authority to execute the same.

The record discloses that the village constable met the appellant on the street about seven o'clock in the evening and notified her that he had a warrant for her arrest. She vigorously protested against the warrant being read to her and insisted on going home. She was taken by the village constable before Police Savage, the Police Magistrate. Appellant became violent and abusive and dared the officer to lock her up. The Judge ordered her locked up and she remained in the village [illegible] time. Her brother and her friends appeared a [illegible] between

on condition that she go home and behave herself. She was released and suit was subsequently dismissed.

It appears that the conduct of appellant was such as to justify the magistrate and constable in committing her until her friends were sent for and arrangements made to take her home. It is true no mittimus was issued for her being put in the calaboose. It was an oversight and a technical violation of the law. The most that can be said is that the appellant is entitled to nominal damages. Such damages mean no damages at all. They exist in name only and not in amount. In the quaint language of an old writer they are 'A mere peg to hang costs on.'

It is next insisted that the verdict and judgment are against the manifest weight of the evidence. The evidence fails to show that appellees did not act in good faith. The jury after hearing the evidence and under proper instruction of the court found for appellees. We are not inclined to disturb their finding. We observe no serious objection to the ruling of the court in the admissibility of testimony.

In conclusion there is little if any merit in this case. We are not inclined to reverse this cause simply on the ground that a verdict for nominal damages would carry the costs with it. Courts do not ordinarily reverse cases in order to afford an opportunity to recover a judgment for costs.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

44844

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

237 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Ellen Callahan,

Appellant,

vs.

E. J. Welter, Sheriff of

La Salle County,

Appellee,

Appeal from the

Circuit Court of

La Salle County.

237 I.A. 658

Jett, P. J.

Ellen Callahan, appellant, instituted a replevin suit in the Circuit Court of La Salle County, against E. J. Welter, sheriff of said county, appellee, to recover the possession of certain personal property of which she claimed to be the owner. A jury trial was had and at the close of the evidence heard on the part of appellant, on motion of appellee, the court directed a verdict in his favor. A motion for a new trial was denied and judgment rendered on the verdict and this appeal followed.

It appears that in July 1923, E. J. Welter, sheriff of La Salle County levied upon certain personal property as the property of John J. Callahan by virtue of an execution issued out of the office of the clerk of the Circuit Court of said La Salle county on a judgment obtained in said court by Leander Short against said John J. Callahan. The affidavit for replevin, the declaration and all other pleadings as abstracted fail to show what property was levied upon, but it appears from the testimony as we get it from the abstract, that it included ~~a piano, a [illegible] touring car, and~~ certain horses and wagons used by the said John J. Callahan in his ice business, a piano and a Paige touring car.

It further appears that from the year 1900, until the year 1925, John J. Callahan who is the husband of appellant was engaged in the retail ice business in La Salle Illinois. During the first few years of that period he conducted the business under the name of the Callahan Ice Company. For fifteen years continuously immediately previous to the time of the levying of the execution heretofore referred to, the business was conducted in the name of John J. Callahan.

Appeal

Circuit Court of

La Salle County.

La Salle County,

Appellee,

2371 I.A. 575

Allen Callahan, appellant, instituted a replevin suit in the Circuit Court of La Salle County, against . J. Fisher, sheriff of said county, appellee, to recover the possession of certain personal property of which she claimed to be the owner. Jury trial was had and at the close of the evidence based motion of appellee, the court directed motion for a new trial was denied and this appeal followed.

It appears that in July, 1[illegible], . J. Fisher, sheriff of La Salle County levied upon certain

1. Callahan by virtue of an execution issued out of clerk of the Circuit Court of said La Salle county, on [illegible] obtained in said court by

included

used by the said John J. Callahan in [illegible]

It further appears that from the year [illegible], until the year 1[illegible], J. Callahan who is the husband of appellant was engaged in the retail ice business in La Salle Illinois. During the first [illegible] of that period he conducted the business under the name of [illegible] Callahan Ice Company. For fifteen years continuously [illegible] previous to the time of the levying of the [illegible] the business was conducted in [illegible] John J.

John J. Callahan borrowed money in his own name which he used in the business; he executed leases in his name upon property used in the business; he purchased automobiles, horses, ice and all of the implements, materials and supplies used in connection with the business; the business was advertised in the name of John J. Callahan; books of account were kept in his name; all money was collected and deposited in his name; the employes were paid by his individual check; statements of account to customers were made out in his name; the property was assessed for taxation and the taxes were paid by him in his name; he spent his entire time in the conduct of the ice business and made no statement and made no accounting to his wife or his mother in the 23 years in which he was engaged in the ice business.

Ellen Callahan, appellant, on the trial of the cause sought to prove that the property levied upon by virtue of said execution belonged to her and Catherine Callahan, the mother of her husband. She, among other things, testified that she bought a half interest in the ice business of Louis Gaynor in the year 1900. On cross examination however, she admitted that her husband conducted the negotiations with Gaynor and paid him the purchase price.

Cathrine Callahan was also a witness on the part of appellant. The appellant and Cathrine Callahan each testified that they were partners and joint owners of the property levied upon; that they turned the business over to John J. Callahan twenty years or more ago and since that time had paid no attention to it; that they had never received any statement concerning the business from John J. Callahan; that they knew he was running the business in his own name in all respects as though it were his own.

Transactions where the wife claims to own property used by and in the possession of the husband are looked upon with suspicion. The opportunity for fraud is great. Haselhoeft vs. Cudahy Packing Co. 44 Ill. App. 128.

Where money of a married woman is by her consent paid to her husband and he has full control of it with her consent and does what

[illegible] Callahan borrowed money in his own name which he used [illegible]; he executed leases in his [illegible] name upon property [illegible] he purchased automobile[illegible], houses, ice and all [illegible] transaction with [illegible] the business was advertised in the name of John [illegible] collected and deposited in his name; [illegible] his individual check; statements of account to customers were made out in his name; the property was assessed for taxation and the taxes were paid by him in his name; he spent his entire time in the conduct of the ice business and made no [illegible] accounting to his wife or his mother in the 25 years in which he was engaged in the ice business.

John Allen Callahan, appellant, on the trial of the cause sought to prove that the property levied upon by virtue of said execution belonged to her and [illegible] Callahan, the mother of her husband. She, among other things, testified that she bought a half interest in the ice business of John Orr [illegible]

examination however, she admitted that her husband conducted the negotiations with Gaynor and paid him the purchase price. [illegible] Cathrine Callahan was also a witness on the part of appellant. The appellant and Cathrine Callahan each testified that they were partners and joint owners of the property levied upon; that they turned the business over to John [illegible]. Callahan twenty years or more ago and since that time had paid no attention to [illegible] never received any statement concerning the business from Callahan; that they knew he was running the [illegible] in his name in all respects as though it were his own.

Transactions where the wife claims to own property used by and in the possession of the husband are looked on with suspicion. The opportunity for fraud is great. Leatherbury v. [illegible] Co. 44 Ill. App. 128.

Where money of a married woman is by her [illegible] husband and he has full control of it with her [illegible]

he pleases with it, the money at least as to his creditors becomes his. Kahn vs. Wood 82 Ill. 219.

The same rule will apply in a case in which the married woman would allow her husband to use, have and control any other personal property other than money. Under the law a husband can undoubtedly act as an agent of his wife for the purposes of managing her seperate property, but it must be an actual and bona fide agency and not an agreement by which, under the color of an agency kept concealed from the public, the husband is to enter into trade with capital furnished by the wife, carry on business in his own name precisely as he would do with his own money and then claim as against his creditors that all the property bought and sold by him in the course of his business is the property of his wife. Wortman vs. Price, 47 Ill. 22.

Under the facts as shown by this record appellant did not make out her case, inasmuch as the burden of proof was upon her to establish her right to possession of the property in controversy. Appellant and Cathrine Callahan claim that they were partners and joint owners of the property levied upon. One member of the partnership cannot sue in her own name and recover the property of or an indebtedness to the firm. Am. Central Railway Co. vs Miles 52 Ill. 174; Supreme Lodge K. & L. of Honor vs. Portingall 64 Ill. App. 283.

The trial court in our opinion committed no error in directing a verdict in favor of appellee. The judgment of the Circuit Court of La Salle County is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

237 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Eugene Brown and DeLoss
Brown, partners doing business
under the name, style and description of
Brown Bros.,

Appellees,

vs.

Hajo H. Block,

Appellant.

Appeal from the County
Court of Peoria County.

237 I.A. 658

Jett, P. J.

Appellees recovered a judgment for Two Hundred Sixty-two and 50/100 Dollars, in an action of assumpsit against appellant for commissions for the sale of a vacant lot situated on Moss Avenue in the City of Peoria. Appellant had made an effort to sell the real estate above mentioned to one Otto Wahlfeld but had not succeeded. Appellees were engaged in the real estate business, and appellant listed the property referred to with appellees for sale, and asked them to try and sell it. Appellees placed signs on the property that they had it for sale and thereafter the said Wahlfeld appeared at their office and inquired as to what property they had for sale. Appellees at that time tried to sell appellant's property to Wahlfeld and offered to show the property to him but he declined for the reason that he passed the property one or more times daily. Appellees thereafter tried to persuade Wahlfeld to purchase the property and a salesman employed by them at another time urged Wahlfeld to go and look at the property and to buy the same. The sale of the property was later made by appellant to Wahlfeld without the knowledge of appellees. At the time of the trial a stipulation was entered into that the sum of Two Hundred Sixty-two and 50/100 Dollars would be a usual and customary commission. Appellant claims and appellees admit that they did not have the exclusive right to sell the property.

It is claimed by appellant that since he had made an effort to dispose of this property to Wahlfeld before appellees were employed to sell the same, and since the sale was made by appellant to Wahlfeld without the knowledge or assistance of appellees, that appellees are

not entitled to a commission on the sale. It is assigned as error that the verdict is contrary to the law and against the evidence.

It was a question of fact for the jury to determine whether appellees were instrumental in making the sale and entitled to a commission therefor. 9 C. J. 657-9.

Furthermore, the second instruction given in behalf of appellant informed the jury that before appellees could recover they must believe from a preponderance of the evidence that the appellees were the procuring cause of the sale, and instructions given on behalf of appellees informed the jury that if they believed from a greater weight of the evidence that appellees were the effectual and procuring cause of the sale, that they were entitled to recover their commissions.

Wahlfeld testified that he wanted the property from the time he first talked to appellant about it; that he went to appellees office for the purpose of finding out the price of two other peices of property nearby, and that appellees priced the other pieces of property to him but told him that the property of appellant was a better bargain and that soon thereafter he condluded the sale with appellant directly, and this witness further testified that he delayed in purchasing the property on account of the price.

This testimony authorized the jury in finding that Wahlfeld went to appellees office for the purpose of determining the market value of the property and inasmuch as the purchaser testified that he wanted the property and that the price was the only question which had previously prevented him from purchasing, we cannot hold that the verdict is contrary to the evidence and the law. It was the province of the jury to determine the weight of the evidence. There was sufficient evidence on the part of appellees to sustain the verdict and judgment. Ashley vs. Heinrich 105 Ill. App. 102; Abrams vs. Rideot 101 Ill. App. 131; Watson vs. Fagner 105 Ill. App. 52; Aff'd. 208 Ill. 136; Whitesell vs. Rising 109 Ill. App. 91.

The court refused to permit Wahlfeld to testify what his state of mind was with regard to the purchase of the property, when he left ~~the office of appellees after a conversation with appellees telephone~~

the office of appellees after a conversation with appellees salesman. Wahlfeld was also asked whether anything appellees salesman said anything during the course of the conversation had any bearing upon his purchase of the property. Objections to both of these questions were properly sustained. It would not have been competent to permit Wahlfeld to testify to a state of mind. Fleet vs. Richenor 156 Calf. 343; 104 P. 458; 34L.R.A. (N. S.) 323; Chamber vs. Chamber 227 Mo. 262;127 S. W. 86.

In Harrison vs. Thackaberry 248 Ill. 512 on page 517, it is said: "Defendant in error was asked and permitted to state how he happened to write the letter and under what circumstances. When he undertook to tell what he meant, the court excluded so much of the answer as undertook to tell his purpose. The witness was also permitted to state that he meant by the words, "about May 5th the year will be up" that the year's interest would be due about that time; that he did not have the note before him when he wrote the letter and had forgotten the exact date. We think this evidence was incompetent. While a writer of a letter offered in evidence may show the circumstances under which it was written, he cannot testify as to his intention or purpose in writing it", citing in support thereof, "(Sutter vs. Rose, 169 Ill. 60; Grant vs. Gallop Ill. id. 487.)"

Appellant cites the case of McGuire vs. Carlson 61 Ill. App. 295 which seems to hold to the contrary but we do not think this case is supported by authority in this State. The testimony of Wahlfeld shows that he did go to the office of appellees for the prupose of obtaining information which lead to a purchase of the property by him, notwithstanding any conclusions he might have given with reference to his mental state, after having talked the matter over with appellees and the salesman. Even if the evidence was competent, Wahlfeld was asked if after he had had the conversation with appellees salesman, whether he intended to return to their office in regard to the property at a later time and he answered this question "No." If there was any error in sustaining the objection to the question, we think it was remedied by the answer to this question.

Complaint is made of the modification of two instructions.

The two modified instructions, among other things, instructed the jury that unless a sale of the real estate was brought about solely through the works and efforts of the plaintiffs, they should find the issues for the defendant. The trial court struck out the word "solely." We do not think there was any error in this respect. We find no reversible error and the judgment of the county court of Peoria County is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five,

Justus L. Johnson
Clerk of the Appellate Court.

4486

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Arthur Johnson,

Appellee,

vs

Clarence M. Bills,

Appellant.

Appeal from Circuit Court of Henry County.

237 I.A. 658

Jett, P. J.

Arthur Johnson, appellee, brought this suit in the Circuit Court of Henry County in assumpsit against Clarence M. Bills, appellant, for damages alleged to have been sustained by him upon a breach of contract by appellant. A trial by jury was had and the finding was in favor of appellee in the sum of $626.40, upon which the court rendered judgment, and the appellant prosecutes this appeal.

The declaration consists of two counts. In the first count it is charged that on October 10, 1920, defendant owned and possessed 55 head of feeder hogs; he offered to sell same to plaintiff and plaintiff offered to buy said hogs for 16 cents per pound provided the defendant would assume the risk of loss of said hogs by a disease known as cholera, and defendant then and there agreed to sell said hogs to the plaintiff at the rate of 16 cents per pound weight and agreed in consideration of the purchase of said hogs by the plaintiff to assume the risk of said hogs dying of cholera and agreed, then and there as part of the consideration moving from defendant to plaintiff, to pay the plaintiff for the loss of said hogs or any part thereof which might die during the feeding thereof at the rate of the purchase price thereof, to-wit: at the rate of 16 cents per pound. It is then averred that under the said agreement plaintiff bought said hogs, drove them to his feeding lots and they were being fed, when, to-wit: 28 of said hogs died of cholera, whereupon the defendant became liable to pay the plaintiff the sum of 16 cents per pound for each pound which the said hogs then and there weighed; that the hogs which died weighed 6250 pounds; that the plaintiff requested the defendant to pay him

Appeal from Circuit Court
of Henry County.

Arthur Johnson, appellee, brought this suit in
ourt of Henry County in assumpsit
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inding was [illegible] upon which
he court rendered judgment, and
appeal.

The declaration consists of two counts. In the first count it is charged that on October 10, 1880, defendant owned and possessed 55 head of feeder hogs; he offered to sell some to plaintiff and plaintiff offered to buy said hogs for 16 cents per pound provided the defendant would assume the risk of hogs by a disease known as cholera, and defendant then and agreed to sell said hogs to the plaintiff at the rate of 16 cents per pound weight and agreed in consideration of the purchase of said hogs by the plaintiff to assume the risk of said hogs dying cholera and agreed, then and there on [illegible] at the consideration moving from defendant to plaintiff, to [illegible] plaintiff for the loss of said hogs or any part thereof [illegible] feeding thereof at the rate of the market price thereof, to-wit: at the rate of 16 cents per pound. It is then averred that under the said agreement plaintiff bought said hogs, drove them to his feeding lots and they were being fed, [illegible]
hogs died of cholera, whereupon the defendant became liable to pay plaintiff the sum of 16 cents per pound for each pound which the [illegible] then and there weighed; that the hogs which died weighed [illegible] that the plaintiff requested the defendant to

$1000 for the loss of said hogs and the refusal by the defendant and damages to the plaintiff of $1000.

In the second count it is averred that on the said day aforesaid, to-wit: October 10, 1920, defendant sold plaintiff 55 head of feeder hogs averaging in weight 135 pounds at 16 cents per pound. As a part of the consideration passing from the defendant to the plaintiff upon the sale of said hogs to the plaintiff, defendant promised the plaintiff that if any of said hogs died of a disease known as cholera during the feeding of the said hogs by the plaintiff that in that event defendant would return to the plaintiff the purchase price of said hogs. The said second count then charges the delivery and purchase of said hogs; that on or about November 18,1920, 30 head of said hogs died from cholera, while the plaintiff was then and there feeding said hogs in his lot in the neighborhood of Geneseo, Henry County, Illinois: that the 30 head of hogs which then and there died weighed 6250 pounds and that the defendant became liable to pay plaintiff the sum of $1000 for the said hogs which then and there died of cholera.

During the trial the declaration was amended. The first count was amended so as to read: "As a part of the consideration moving from defendant to plaintiff, defendant agreed to pay plaintiff for the loss of said hogs or any part of them which died during the feeding thereof at the rate of the purchase price thereof, to-wit: at the rate of 16 cents per pound provided the plaintiff did not vaccinate the said hogs. Plaintiff avers that under such agreement he bought said hogs and said hogs were delivered to said plaintiff and that said hogs were driven to the feeding lots of the plaintiff and were there being fed and plaintiff did not at any time vaccinate said hogs and, to-wit: November 20 and within 10 days thereafter 28 of said hogs died of cholera."

The second count was amended by charging that "the defendant promised the plaintiff that if any of said hogs died of a disease known as cholera during the feeding of said hogs by the plaintiff that in that event defendant would return to the plaintiff the purchase price of the hogs provided the plaintiff would not vaccinate

$1000 for the loss of said hogs and the refused by m
and damages to the plaintiff of $1000.

In the second count it is alleged that on the sa
said, to-wit: October 1, 1920, defendant sold plaintiff 85
of feeder hogs averaging in weight 125 pounds at 16 cents
pound. As a part of the consideration passing from the defendant
to the plaintiff upon the sale of said hogs to the plaintiff,
defendant promised the plaintiff that if any of said hogs died of
a disease known as cholera during the feeding of the said h
the plaintiff that in that event defendant would return
plaintiff the purchase price of said hogs. The sai
then charged the delivery and purchase of said hogs;
about November 18, 1920, 30 head of said hogs died from
the plaintiff was then and there feeding said hogs in
the neighborhood of Geneseo, Henry County, Illinois;
head of hogs which then and there died weighed 6850
the defendant became liable to pay plaintiff the sum
the said hogs which then and there died of cholera.
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The second count was amended by averring that the defendant
promised the plaintiff that if any of said hogs died of a disease
known as cholera during the feeding of said hogs by
that in that event defendant would return to th
purchase price of the hogs provided the plaintiff was

the said hogs; that the said hogs became sick of the cholera and a large number to-wit, 30 head of said hogs died of the cholera while the plaintiff was then and there feeding said hogs in his lots in Henry County, and plaintiff did not vaccinate nor cause to be vaccinated said hogs." Then follows the conclusion as originally set out in the declaration.

No plea was filed other than the general issue. The trial was had upon the amended declaration and the general issue with the result as aforesaid. A number of errors are assigned why the cause should be reversed. The ones argued are, First, that there was no consideration to support the contract. Second: that the court erred in restricting the cross examination of the witness Clark offered by appellee. Third: that the court erred in the admissibility of testimony on the part of appellee and in the refusal of evidence offered by appellant and in the exclusion of evidence. Fourth: that the court erred in giving instructions 2 and 3 that were given on the part of appellee.

This cause was submitted to the jury upon an amended declaration setting up that the appellant sold certain feeder hogs to appellee with the promise that should the hogs die of cholera and if appellee did not vaccinate said hogs for cholera the appellant would pay the loss. It appears that there was no other issue in the case. It has been frequently held that any act which is a benefit to one party or a disadvantage to the other is a sufficient consideration to support a contract. Buchanan vs. International Bank 78 Ill. 500. Schlatter vs Friebel 294 Ill. 412-415.

We are of the opinion that the contention of appellant that there was no sufficient consideration to support the contract is without merit.

It is next insisted that the court improperly limited the cross examinations of a witness called by appellee. On an examination of the abstract we are of the opinion that the court did not err in restricting the cross examination of the witness Dr. Clark.

It is also the contention of appellant that reversible error was committed on the trial of the case by the action of the court in

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larger number to-wit, 30 head of said hogs died of the cholera
the plaintiff was then and there feeding said hogs in his lot[illegible]
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restricting the cross examination of the witness [illegible]
It is also the contention of appellant that the evidence
was some kind or [illegible] of the case. The [illegible]

excluding evidence sought to be brought out by the appellant, and in the refusing to permit witnesses to answer certain questions submitted on cross examination by the appellant. After an examination of the abstract we are not prepared to say the action of the court in this respect was erroneous.

Appellant insists that it was error to give the 2nd and 3rd instructions given on the part of appellee. The principal objection to the 2nd instruction is that the word "preponderance" was omitted therefrom. The record discloses that a number of instructions given by both appellant and appellee informed the jury that there could be no finding for appellee unless he had proven his case by the preponderance of the evidence. Under the rule it is not reversible error to omit the word "preponderance" from an instruction where it appears in other instructions given in the series. In the instant case the jury was told in three instructions given on the part of appellee and in four given by appellant that it was incumbent upon appellee to establish his case by a preponderance of the evidence. Other objections are made to this instruction but after an examination of them, we are of the opinion there was nothing in the instruction that was calculated to prejudice the rights and interests of appellant.

We have examined the criticisms of appellant made to the 3rd instruction. The instructions complained of by appellant when examined in the light of the issues and of the instructions of appellant lead us not only to the conclusion that appellant is not in a position to urge his objections to instructions 2, and 3, but that no reversible error was made in giving them. The instructions submitted the questions of fact namely whether or not the hogs had the cholera and whether they were vaccinated by the direction of appellant. Appellants instructions 9 and 10 submitted the questions as to the character of the disease and 11 and 12 submitted the question whether he directed the vaccination of the hogs. The issue was made by the pleadings. There is no variance pointed out. The evidence sustains the averments of the declaration. We find no reversible error intervened in the trial of the case and the judgment of the Circuit

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of the abstract we are not prepared to say the action of the court
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appellee and in four given by appellant that it was incumbent upon
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tions
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character of the disease and 11 and 12 submitted the question whether
he directed the vaccination of the hogs. The issue is made by the
pleadings. There is no variance pointed out. The evidence sustains
the averments of the declaration. We find no reversible error intro-

Court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

7276

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

237 I.A. 659

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Mark T. Welch, Administrator of the estate of Susie C. Dunn, deceased,
Appellee,

vs.

Public Service Company of Northern Illinois,

Appellant.

Appeal from

Grundy County.

237 I.A. 659

Jones J.

Mark T. Welch, Administrator of the estate of Susie C. Dunn, deceased, appellee, filed this suit in the Circuit Court of Grundy County against the Public Service Company of Northern Illinois, Bernard Roth, Harry Gipes, William Fessler and H. B. Hitchcock to recover damages for the death of his intestate alleged to have been caused by the negligent acts of the defendants. ~~The defendant Hitchcock demurred to the declaration. The Court sustained the demurrer and dismissed said cause as to him. Thereafter,~~ There was a trial before a jury, which found the appellant, the Public Service Company of Northern Illinois, guilty as charged in the declaration and fixed plaintiff's damages at $8000. There was a verdict of not guilty as to the other defendants. The Court thereupon entered judgment upon the verdict and this appeal followed.

No question is raised upon pleadings. Bernard Roth was the owner of a two story building located on Liberty Street in Morris, Illinois. The ground floor consisted of a room used as a saloon previous to the passage of the Prohibition Law and later used as a store room, until a few days before the death of plaintiff's intestate. The upper story was used as a flat and at the time in question was occupied by plaintiff's intestate. There was no connection between the ground floor and the second story. Access to the second story was had by means of a closed inside stairway leading directly to the street in front with no door from the stairway into the lower floor. There was a back stairway outside. The lower floor was equipped with gas fixtures. The service pipe came into the building under a platform in the front window. The meter was connected at this point.

Mark . Welch, Administrator of the
estate of Susie O. Dunn, deceased,
Appellee,

vs.

Public Service Company of Northern
Illinois,

Appellant.

Jones J.

Mark . Welch, Administrator of the estate of Susie . Dunn, deceased, appellee, filed this suit in the Circuit Court of Kane County against the Public Service Company of Northern Illinois, Bernard Roth, Harry Gipse, William Weasler and . . Stebbeck to recover damages for the death of his intestate alleged to have been caused by the negligent acts of the defendants.

Service Company of Northern Illinois, guilty as charged in the declaration and fixed plaintiff's damages at $8000. Upon this verdict of not guilty as to the other defendants, the court entered judgment upon the verdict . . . . . al Public Se.

No question is raised upon . . . . . Susie Dunn was the owner of a two story, building located . . . Aurora, Illinois. The ground floor consisted . . . . . previous to the passage of the condition . . . . . store room, until a few days before the death . . . plaintiff . . . The upper story was used as a flat and . . . . occupied by plaintiff's intestate. . . . . the ground floor and the second story. . . . . was had by means of a closed inside stairway . . . . . street in front with no door from . . . . . There was a back stairway outside. . . . . gas fixtures. The service pipe came into the building form in the front window. The meter was connected . . . .

The main feed pipe ran up to the ceiling, thence lengthwise along the center of the room. During the time the room was used as a saloon, a gas stove was kept on the bar. A pipe ran along the north wall from the gas stove to the ceiling where it connected with another pipe running across the ceiling. When the saloon went out of business, the pipe connecting the stove with the diagonal pipe was removed but the end of the pipe on the ceiling was not covered or plugged. The building had been lately re-papered. In doing this work, the paper was not placed closely in the corners between the ceiling and the walls but rounded so that it left an open space termed by counsel "a cove around the room." The end of the diagonal pipe mentioned above was hidden behind the paper, but the outline of the pipe across the ceiling was clearly discernible, under the paper.

It is claimed by the appellee that the death of his ~~intestate~~ was occasioned by asphyxiation, the gas having escaped from the end of the diagonal pipe and passed from that point through numerous openings into the stairs leading to the flat, from which place it could pass through many open spaces into the apartment above. Prior to the 8th of December 1920 the defendant Harry Gipes had rented the lower floor for use in his trade of cleaner and dyer. In that business he required the use of gas and asked the Public Service Company to put in a meter and connect up the gas. The company sent Lew Barrows to the premises, who placed the meter in and connected it with the gas mains belonging to the company, but he did not turn on the gas. It is admitted that Barrows pointed out two or three places where the pipes were uncapped at the end and directed the defendant Gipes to see that they were closed, before turning on the gas. Barrows testified that he called the attention of Gipes to the diagonal pipe in question and told him that he must see to it that that pipe was plugged, if it were not already closed. This Gipes denies, but says that Barrows told him that when the other pipes were capped, he could turn on the gas. There is also a conflict in the testimony with respect to whether there was a hole in the paper disclosing the uncapped end of the diagonal pipe. Gipes turned the gas on about

The main feed pipe ran up to the ceiling, thence lengthwise along the [illegible] of the room. During the time the room was used as a saloon, a gas stove was kept on the bar. A pipe ran along the north wall from the gas stove to the ceiling where it connected with another pipe running across the ceiling. When the saloon went out of business, the pipe connecting the stove with the diagonal pipe was removed but the end of the pipe on the ceiling was not covered or plugged. The ceiling had been lately re-papered. In doing this work, the paper was not placed closely in the corners between the ceiling and the walls but rounded so that it left an open space termed by counsel "a cove around the room." The end of the diagonal pipe mentioned above was hidden behind the paper, but the outline of the pipe across the ceiling was clearly discernible, under the paper.

It is claimed by the appellee that the death of [illegible] was occasioned by asphyxiation, the gas having escaped from the end of the diagonal pipe and passed from that point through numerous openings into the stairs leading to the flat, from which place it could pass through many open spaces into the apartment above. But to the 8th of December 1920 the defendant Harry Dixon had rented lower floor for use in his trade of cleaner and dyer. In his business he required the use of gas a [illegible] Company to put in a meter and connect up the gas. [illegible] Low Barrows to the premises, who placed the [illegible] it with the gas mains belonging to the company, but he did not turn on the gas. It is admitted that Barrows [illegible] the places where the pipes were [illegible] defendant Dixon to see that they were closed, before [illegible] Barrows testified that he called the attention [illegible] diagonal pipe in question and told him that he must see to it [illegible] was plugged, if it were not already closed. [illegible] says that Barrows told him that when the other pipes were [illegible] could turn on the gas. There is also a conflict in the [illegible] with respect to whether there was a hole in the paper [illegible] unwrapped end of the diagonal pipe. Dixon testified [illegible]

6:30 P.M. on December 8, 1920 and it remained on until 1:30 o'clock P.M. the next day.

The defendant Gipes first discovered that there was a leak in the gas pipes about nine o'clock in the morning of December 9th. A brief search was made, but the leak was not discovered. In the afternoon a more thorough search was made. Barrows and others entered the apartment above and found it to be so full of gas that no one could stay in the rooms for a time. They found plaintiff's intestate dead in bed with the covers partly back. She had dressed for bed in the kitchen where her clothing was found.

It is first contended that the suit was not filed within one year of the date of the death of defendant's intestate. The declaration was filed on December 8, 1921. The right of action accrued immediately upon the death of plaintiff's intestate and continued for a period of one year during which time the suit must be filed. This period would end at midnight on the corresponding day of the succeeding year less one day. (Shrimplin, Administrator, etc., v. Cleveland, Cincinnati & Chicago Railway Company, General No. 7255, decided by this court at the April Term A.D. 1924.) Whether the suit in this case was begun within the year depended upon whether plaintiff's intestate died before midnight of December 8th, or after that time on December 9th. This was a question of fact for the jury which has been determined adversely to the appellant. Taking into consideration the presumption of the continuance of life, we see no reason for disturbing the judgment on this ground.

It is next insisted that the argument of counsel for the appellee was of a character calculated to prejudice the minds of the jury against the appellant company in that counsel indicated his belief that the evidence did not show negligence on the part of any of the defendants, except the Public Service Company of Northern Illinois and Harry Gipes, and also that counsel made statements calculated to influence the minds of the jury because it is a corporation. We have examined the argument presented in the abstract and find that while counsel made some improper remarks, on every occasion that the appellant objected to the argument, the court sustained the objection. No advantage can be taken of argument to which no objection is made. In this

.M. on December 4, 1920 and it remained on until 1:30 o'clock
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ing year less one day. (Shurlupin, Administrator, . . . v. Cleveland,
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turning the judgment on this ground.

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to the argument, the court sustained the objection. . . . .
gen e . . . ken of argument to which no objection is made. . . . .

situation there is no reversible error.

The appellant contends that the court erred in permitting certain witnesses to testify that they smelled the odors of gas in and about the premises in question prior to and about the time of the alleged injury, and further that they had detected the odor of gas in the flat two or three years prior to the time of the alleged injury. This testimony was offered on the theory of bringing notice to the defendants. It was certainly admissible at least against the defendant Roth, the owner of the building. The objection on the part of the Public Service Company was general, and no motion was made to limit the testimony to a particular purpose. It does tend to bring notice to the appellant. For this reason we think there was no error in admitting it.

The Court refused to give instruction number 30 offered on the part of the appellant, which is as follows: "The Court instructs the jury that if they believe from the evidence that the deceased came to her death before the hour of nine o'clock on the morning of December 9th, 1920, that then you are to disregard all the testimony and evidence relating to causes of the death of said deceased, which occurred on said 9th day of December 1920, so far as the defendant, the Public Service Company of Northern Illinois is concerned." From this instruction we are unable to see just what counsel had in mind, but from the argument it appears that counsel wished to have the jury instructed not to consider any evidence tending to show negligence on the part of the company on December 9, 1920, provided they believed the deceased died prior to nine o'clock A.M. of that day. Whether this would be a proper instruction we will not consider, because the instruction, as tendered, was so ambiguous, and misleading that it was properly denied. Appellant's instructions 33, 35, 38 and 39 were properly refused by the court because they do not state correct propositions of law. They are all based upon the theory that the defendant Company is not bound to inspect pipes in a building before turning on gas, where injury to persons other than the customer is likely to result. This question is hereinafter discussed more at length.

Error is also predicated upon the refusal of the Court to permit

the premises in question before [illegible] and who

[illegible]ary, and further that they had detected the odor of gas in the flat

[illegible]o or the

It was certainly admissible at [illegible] against the defendant Roth, the owner of the building. The objection on the part of the public service company was general, and no motion was made to limit the [illegible] to a particular purpose. It does tend to bring notice to the management. For this reason we think there was no error in admitting [illegible].

The Court refused to give instruct[illegible] number 20 offered on the part of the appellant, which is as follows: "The Court instructs the jury that if they believe from the evidence that the deceased came to her death before the hour of nine o'clock on the morning of December 9th, 1920, that then you are to disregard all the testimony and evidence relating to causes of the death of said deceased, which occurred on said 9th day of December 1920, so far [illegible]

Service Company of Northern Illinois is concerned." Upon this instruction we are unable to see that [illegible] counsel had the right, but [illegible] the argument it appears that counsel wished to have the jury instructed not as to consider any evidence relating to [illegible] of the [illegible] of the company on December 9, 1920, provided they believed the deceased died prior to nine o'clock [illegible] of that day. Whether the [illegible] proper instruction we will not [illegible] tendered, was so ambiguous, and misleading that it was [illegible] Appellant's instructions 33, [illegible] 36 and 37 were properly refused by the court because they do not state correct [illegible]. They are all based upon the theory that the defendant [illegible] to inspect pipes in a building before [illegible] to persons other than the consumer is likely to result. This question is hereinafter discussed more at length.

[illegible]ner is also predicated upon the refusal of the Court to grant

Dr. Joseph Springer, an expert called by appellant to give his opinion of the time of death of appellee's intestate, in response to a hypothetical question. Counsel do not cite any case showing that it is competent to prove the time of death by an expert witness where death resulted from asphyziation at a time not definitely known and we think, from the authority of I.C. R.R. Co. v. Smith 208 Ill. 608 this testimony was properly rejected.

Error is assigned upon the refusal of the Court to direct a verdict in behalf of appellant at the close of the evidence on the part of the appellee and again at the close of all the testimony. If there was any evidence in the record fairly tending to support the declaration, the motion was properly denied. (Libby, McNeill & Libby v. Cook 222 Ill. 206.) Upon an examination of this record we are satisfied that there is competent evidence fairly tending to prove the issues involved. The Court therefore committed no error in denying the ~~prex~~ peremptory instruction offered.

One of the important questions in this case is that bearing upon the duty under the particular facts as disclosed in this record, of appellant to appellee's intestate. Upon an examination of the authorities, we have reached the conclusion that the appellant company, while it might be under no duty to inspect the pipes in question for the protection of the customer Harry Gipes, it did owe a duty to appellee's intestate not to allow its gas to be turned into the defective system of pipes not owned or controlled by appellee's intestate. There is a distinction between the duty owing to an applicant for gas and the duty when supplying gas to such applicant to protect other tenants in the same building, who have ~~xxx~~ not applied for it.

In 28 Corpus Juris, at page 595, it is said, "A distinction has been drawn in this respect between the duty owing to an applicant for gas and the duty when supplying gas to an applicant to protect other tenants in the same building who have not applied for it. With respect to such tenants it has been held that the company must use reasonable precaution to ascertain that the pipes in the building are in such condition that gas will not flow into the apartments to their injury." The same rule is announced in 12 Ruling Case Law

Dr. Joseph Springer, an expert called by appellant to give his opinion of the time of death of appellee's intestate, in response to a hypothetical question. Counsel do not cite any case showing that it is competent to prove the time of death by an expert witness where death resulted from asphyxiation at a time not definitely known from the authority of I.G. A.L. Co. . 59 So. 808 Ill. 808 this testimony was properly rejected.

In Error is assigned upon the refusal of the Court to direct a verdict in behalf of appellant at the close of the evidence on the part of the appellee and again at the close of all the testimony. If there was any evidence in the record fairly [illegible] to support the declaration, the motion was properly denied. (Libby, McNeill & Libby v. Cook 222 Ill. 206.) Upon an examination of this record we are satisfied that there is competent evidence fairly tending to prove the issues involved. The Court therefore committed no error in denying the peremptory instruction offered.

In. One of the important questions in this case is that bearing upon the duty under the particular facts as [illegible] of appellant to appellee's intestate. Upon an examination of the authorities, we have reached the conclusion that the appellant company, while it might be under no duty to insure the pipes in question for the protection of the customer Harry Ayres, it did owe a duty appellee's intestate not to allow its gas to be turned into the defective system of pipes not owned or controlled by appellee. There is a distinction between the duty owing to an applicant for gas and the duty when supplying gas to such applicant to protect other tenants in the same building, who have not [illegible] for it.

In 28 Corpus Juris, at page 596, it is said, "A distinction has been drawn in the respect between the duty [illegible] applicant for gas and the duty when supplying gas to an applicant to protect other tenants in the same building who have not applied for it. In respect to such tenants it has been held that [illegible] reasonable precaution to ascertain that the [illegible] are in such condition that gas will not flow [illegible] to their injury." The same rule is known

page 909. This rule is sustained b a number of authorities viz, Christo v. Macon Gas Co. 18 Ga. App. 454; 89 S.E. 532; Schmeer v. Gass Light Co. 147 N.Y. 529; 42 N.E. 202; 30 L.R.A. 653; Greed V. Mfgrs. Light & Heat Co. 238 Pa. 248; 86 Atl 95; Skogland v. St. Paul Gas Light Co. 89 Minn. 1; 93 N.W. 668.

It will be borne in mind that plaintiff's intestate was a tenant in an apartment directly over the apartment of the defendant Gipes, and it was Gipes who applied for the installation of gas service. Appellee's intestate was not using gas and had no control of the pipes and fixtures through which the Gas Company allowed the gas to pour so that it flooded her apartment in the night time when she was in bed. It is shown that the gas company, through its agent Barrows knew at the time the gas meter was installed that appellee's intestate was occupying the apartment above. For that reason the authorities quoted are particularly applicable.

It is argued at length that the verdict is excessive. The intestate left four children as her only heirs at law, two of whom were minors. There is but little showing of financial dependence. This however is not controlling. The law presumes substantial damages from the death alone. (Mahlstedt v. Ideal Lighting Company 271 Ill. 154; Dukeman v. C.C.C. & St. L. R.R. Co. 237 Ill. 104.) We are of the opinion that the verdict should not be set aside on the ground that it is excessive.

Since we find no error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

page 503. This rule is sustained by numbers
v. Macon Gas Co. 18 Ga. App. 484;
Co. 147 N.Y. 529; 42 N.E. 202; A. 6B3;
& Heat Co. 238 Pa. 246; 86 Atl 38; Shopland v.
Co. 89 Minn. 1; 93 . 658.

It will be borne in mind that plaintiff's testate was a tenant in an apartment directly over the apartment of the and it was Gipes who applied installation Appellee's intestate was not using gas and had pipes and fixtures through which the Gas Company ? port so that it flooded her apartment the ? bed. company, through knew at the time the gas meter was installed that was occupying the apartment above. For that reason quoted are particularly applicable.

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Since we find no error in judgment, court will be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,
Defendant in Error,

vs.

Gregoir Carpentier and E. J. Carpentier,
Plaintiffs in Error.

Error to County
Court of Rock
Island County.

237 I.A. 659

Jones J.

The plaintiffs in error, Gregoir Carpentier and E. J. Carpentier, sued out this writ of error directed to the county court of Rock Island County to review a judgment of that court after a trial of the plaintiffs in error upon an information, containing two count. The first count charges that the plaintiffs in error "did then and there unlawfully possess intoxicating liquor at the premises known as 945 15th Avenue in the city of East Moline. . ." The second count charges that the plaintiffs in error "did then and there unlawfully keep for sale intoxicating liquor at the premises known as 945 15th Avenue in the city of East Moline. . ."

The defendants in error moved to quash the information in the trial court and the court overruled the motion. This is assigned as error on the part of the court. The only question before us is the sufficiency of the information. This case is, in all essentials, the same as the People vs. Beernaert, General No. 7311 decided by us at this term and is controlled by the decision of the Supreme Court in the cases of People vs. Barnes, 314 Ill. 140 and People vs. Martin 314 Ill. 110. What we said in People vs. Beernaert is applicable in this case. For the reasons there given, the information is insufficient and the cause will be reversed and remanded.

Reversed and Remanded.

The People of the State of Illinois,
Defendant in Error,

vs.

Regol Carpenter and v. G. Carpenter,
Plaintiffs in Error.

Error to County
Court of Rock
Island County.

[illegible]

[illegible] G. Carpenter,
[illegible] the county court of Rock Island County to review a judgment of that court after a trial of the [illegible] in error upon an information, containing two counts. [illegible] charges that the plaintiffs in error did then and there unlawfully possess intoxicating liquor at the premises known as 248 18th avenue in the city of East Moline. [illegible] The second count charges that the plaintiffs in error did then and there unlawfully keep for sale intoxicating liquor at the premises known as 248 18th avenue in the city of East Moline. [illegible]

The defendants in error moved to quash the information in the trial court and the court overruled the motion. This is assigned error on the part of the court. The only question before us is the sufficiency of the information. This case is, in all essentials, the same as the People vs. Beermert, General No. 7211 decided by us [illegible] of the Supreme Court in the cases of People vs. Barnes, 214 Ill. 140 and People vs. [illegible] 214 Ill. 110. What we said in People vs. Beermert is applicable in this case. For the reasons there given, the information is insufficient and the cause will be reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 65. General No. 7323

Village of Downers Grove,

appellee,

vs.

Jacob Glos,

appellant,

Appeal from Circuit Court of Du Page County.

237 I.A. 659

Jones, J.

This was a proceeding in the circuit court of Du Page County by the Village of Downers Grove, appellee, against the appellant, Jacob Glos, and others, to foreclose for unpaid special assessments against about one hundred eighty five lots in the village of Downers Grove, Illinois. This included seventy five lots belonging to the appellant Jacob Glos. There was a decree in that proceeding ordering the property sold by the County Treasurer. The appellant prayed an appeal from the decree to the Supreme Court, where the decree was affirmed and will be found reported as Village of Downers Grove v. Jacob Glos, et al, 307 Ill. 294. Thereupon the County Collector advertised the property for sale. The advertisements provided that the sale should take place on June 9, 1923, at ten o'clock in the forenoon. There was a daylight savings ordinance in force in the Village of Downers Grove fixing the time one hour earlier than standard time. On June 9th the collector began the sale at ten o'clock daylight savings time but nine o'clock by standard time. The appellant claims that he was present at the place of sale a few minutes before ten o'clock standard time but that the sale had commenced and some of his property had already been sold, that he thought the sale was illegal and because of that refrained from bidding on any of the unsold property although he remained at the sale until its close several hours later.

The county collector filed his report of sale to the circuit court, to which the appellant filed objections. At the hearing to support the objections, the appellant offered

Agenda No. 65. General No. 7525

Village of Downers Grove,

appellee,

. Appeal from Circuit Court

va. of Du Page County.

Jacob Glos,

appellant,

Jones, J.

This was a proceeding in the circuit court of Du Page County by the Village of Downers Grove, appellee, against the appellant, Jacob Glos, and others, to foreclose for unpaid special assessments against about one hundred eighty five lots in the village of Downers Grove, Illinois. This included seventy five lots belonging to the appellant Jacob Glos. There was a decree in that proceeding ordering the property sold by the County Treasurer. The appellant prayed an appeal from the decree to the Supreme Court, where the decree was affirmed and will be found reported as Village of Downers Grove v. Jacob Glos, et al, 307 Ill. 294. Thereupon the County Collector advertised the property for sale. The advertisements provided that the sale should take place on June 9, 1922, at ten o'clock in the forenoon. There was a daylight savings ordinance in force in the Village of Downers Grove fixing the time one hour earlier than standard time. On June 9th the collector began the sale at ten o'clock daylight savings time but nine o'clock by standard time. The appellant claims that he was present at the place of sale a few minutes before ten o'clock standard time and that the sale had commenced and some of his property had already been sold, that he thought the sale was illegal and because of that refrained from bidding on any of the unsold property although he remained at the sale until its close several hours lat

The county collector filed his report of sale to the circuit court, to which the appellant filed objections. At the hearing to support the objections, the appellant offered

in evidence his affidavit and the affidavit of two other men setting up the facts above detailed and also setting out that he was the owner of some of the lots and had intended to pay the assessments in order to prevent a sale of some of the lots, and to bid on others but that he was prevented from doing so by reason of the fact that the sale had already begun when he reached the courtroom. Upon the objection of appellee the court refused to admit the affidavits in evidence upon the ground that the appellee would have no opportunity to cross-examine the witnesses and announced that the court would hear oral evidence. The appellee did offer the testimony of the county clerk to show that the sale was commenced at ten o'clock day light savings time, which would be nine o'clock standard time and offered other documentary proof from the files in the case. This proof did not show at what time appellant's lots were sold. No other oral evidence was submitted by the appellant and the court confirmed the sale.

Two errors only are argued; First, that the court improperly refused to admit the affidavits in evidence in support of the objections to the sale, and second, that beginning the sale at nine o'clock standard time instead of ten o'clock rendered the sale void.

An examination of the authorities shows that the rule is that upon objections to a sale the proofs may be heard by the court on affidavits. (Barling v. Peters, 134 Ill. 606.) Or the court may hear the case upon evidence in open court. (Stivers v. Stivers, 236 Ill. 160). We are of the opinion, from the cases cited, that it is within the sound discretion of the court to determine whether the objections will be on affidavits or on oral testimony. In this case, the court refused to hear objections on affidavits, and gave appellant an opportunity to produce evidence in open court so that the witnesses might be cross examined by the appellee. In this respect the court committed no error.

[illegible]

[illegible] the court refused to admit the affidavit in evidence [illegible] grounds that the appellee would have no opportunity to cross-examine the witnesses and announced that the court would hear oral evidence. The appellee did offer the testimony of the [illegible] [illegible] Ilsmith's lots were [illegible]. No other oral evidence was submitted by the appellant and the court confirmed the sale.

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[illegible] upon objections to a sale the proofs [illegible] on affidavits. (Barling v. Peters, 104 Ill. 506.) Or the court may hear the case upon evidence in open court. (Stivers v. Stivers, 236 Ill. 160. We are of the opinion, from the cases cited, that it is within the sound discretion of the court to determine whether the objections will be on affidavits or on oral testimony. In this case, the court refused to hear objections on affidavits, and gave appellant an opportunity to produce evidence in open court so that the witnesses might be cross examined by the appellee. In this respect the court committed no error.

The decree of foreclosure specified a particular time within which the various amounts due should be paid. Payments were not made within the time specified, and the property was advertised for sale. The appellant is in no position to urge that there was error in the sale of lots, which he did not own and in which he had no interest. He has made no showing whatever upon this feature of the case even in the rejected affidavits. The only objection he can have is that his own property was sold before the hour of ten o'clock standard time. After offering the affidavits in evidence, the appellant produced no other evidence to show that any of his lots were sold before the hour of ten o'clock standard time. Appellant might have bid upon the lots sold after he reached the sale but did not do so. We cannot say from the evidence that he was in any wise injured because we cannot know that any of his lots were sold prior to the time for which they were advertised. In addition to this if the sale were illegal and the appellant desired to avoid the penalty of a sale, he should have tendered to the county clerk the amount of taxes due, and then filed his objections to the sale and report of sale on the ground that the sale was not held as prescribed in the notice. Without such tender he is in no position to have the sale set aside.

It has been held that the mere irregularity in not carrying out the provisions of the decree will not be sufficient to set aside the sale, unless substantial injury has been done. (Garrett v. Moss, 20 Ill. 549; Barling v. Peters, supra.)

For the reasons herein set forth, the decree confirming the sale will be approved.

Decree approved.

No. 4. The decree of foreclosure specified a particular time within which the various amounts due should be paid. Payments were not made within the time specified, and the property was advertised for sale. The appellant is in no position to urge that there was error in the sale of lots, which he did not own and in which he had no interest. He has made no showing whatever upon this feature of the case even in the rejected affidavits. The only objection he can have is that his own property was sold before the hour of ten o'clock standard time. After offering the affidavits in evidence, the appellant produced no other evidence to show that any of his lots were sold before the hour of ten o'clock standard time. Appellant might have bid upon the lots sold after he reached the sale but did not do so. We cannot say from the evidence that he was in any wise injured because we cannot know that any of his lots were sold prior to the time for which they were advertised. In addition to this if the sale were illegal and the appellant desired to avoid the penalty of a sale, he should have tendered to the county clerk the amount of taxes due, and then filed his objections to the sale and report of sale on the ground that the sale was not held as prescribed in the notice. Without such tender he is in no position to have the sale set aside.

It has been held that the mere irregularity in not carry out the provisions of the decree will not be sufficient to set aside the sale, unless substantial injury has been done. (Barnett v. Moss, 20 Ill. 549; Berling v. Peters, supra.

For the reasons herein set forth, the decree confirming sale will be approved.

Decree approved.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Anton Kristel, Appellee,

vs.

Appeal from
Will County.

Michigan Central Railway Co.,
Appellant.

237 I.A. 659

Jones J.

The appellee filed suit in the circuit court of Will County to recover for injuries sustained by him when he was struck by a train operated by the appellant at or near the intersection of appellant's right of way and Taft Street in the city of Gary, Indiana. He lost both of his legs. There was a trial in the circuit court resulting in a verdict and judgment for the appellee for $11,000, which judgment was reversed by this Court, and the cause remanded for a new trial, (See 213 Ill. App. 518). On the second trial the appellee recovered a judgment for $15,000 from which this appeal is taken.

The evidence shows that Taft Street extends north and south through the city of Gary. The tracks of appellant extend east and west and intersect Taft Street. The appellee was going north on the east side of Taft Street about eight o'clock on the evening of September 26th, 1916. It was quite dark at that time, very cloudy and misting some. A train operated by the appellant was going east. According to the evidence of appellee, he waited on the crossing for this train to pass and then undertook to cross the tracks. A train going west along the side track struck the appellee and ran over one of his legs. He testifies that he fell over the pilot of the engine, clung to it for a little time, and was carried from the crossing westward a considerable distance. He finally fell off the front of the engine and his other leg was cut off.

The declaration consisted of ten counts all of which alleged that the appellee was struck at the corssing on Taft Street. Each count charged a different act of negligence, the charges being the failure to ring a bell, failure to give statutory signals, permitting

Anton Kristel, Appellee,

vs.

Michigan Central Railway Co.,
Appellant.

Appeal from
Will County.

237 I.A. 659

Jones J.

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The evidence shows that Taft Street extends north and south through the city of Gary. The tracks of appellant extend east and west and intersect Taft Street. The appellee was going north on east side of Taft Street about eight o'clock on the evening of December 26th, 1916. It was quite dark at that time, very cloudy and misting some. A train operated by the appellant was going [illegible] According to the evidence of appellee, he waited on the crossing for this train to pass and then undertook to cross the tracks. [illegible] going west along the side track struck the appellee and ran over one of his legs. He testifies that he fell over the pilot of the engine, clung to it for a little time, and was carried over the crossing westward a considerable distance. He finally fell off the front of the engine and his other leg was cut off.

The declaration consisted of ten counts all of which [illegible] that the appellee was struck at the crossing on [illegible] count charged a different act of negligence, the charges being the failure to ring a bell, failure to give statutory signals, permitting

an automatic bell signal upon which plaintiff relied to be out of order, so that it failed to ring, operating the train with a dim and insufficient headlight, undertaking to maintain a street light at said crossing but failing to keep it lighted at the time in question; failure to exercise ordinary care to discover plaintiff's conditio of peril on the front part of the engine and stop the train, wilfully operating the train so as to strike plaintiff and to drag him and wilfully failing to keep any lookout for persons on said crossing.

Upon the former hearing of this case we held that under the evidence then before the Court the verdict was clearly against the preponderance of the evidence and that it should have been set aside. The appellee testified in that trial that he knew the gates at the crossing were not operated after six o'clock P.M. so that he did not rely upon the gates for protection. There was no evidence of any wilful misconduct on the part of the servants of the appellant. Neither was there any evidence that the appellant undertook to maintain a street light at the Taft Street crossing. We also held on the former trial that the more credible testimony warranted the conclusion that the appellee was not struck on the Taft Street Crossing, but a considerable distance west of it on the private right of way of appellant; that if the jury had so found, the appellee could not have recovered a judgment for two reasons, there was a variance since each count of the declaration charged that the appellee was struck upon the crossing, and if he was struck at a considerable distance west of the corssing he was a trespasser and the company owed him no duty except to avoid wilfully injuring him after his presence was discovered. The evidence did not show a wilful injury. We also held that the jury should have found that the appellee was guilty of contributory negligence in carelessly going upon the other two tracks without looking eastward, after the train passed eastward, and that the negligence charged in the declaration was not proved.

Under this state of facts the finding of this Court upon the former appeal is binding upon us now and is the law in this case, except in so far as the evidence is different. The only material

an automatic bell signal upon which plaintiff relied to be out of order, so that it failed to ring, operating the train with a dim and [illegible] headlight, undertaking to maintain a street light at said crossing but failing to keep it lighted at the time in question, failure to exercise ordinary care to discover plaintiff's condition of peril on the front part of the engine and stop the train, wilfully operating the train so as to strike plaintiff and to drag him and wilfully failing to keep any lookout for persons on said crossing.

Upon the former hearing of this case we held that under the evidence then before the Court the verdict was clearly against the preponderance of the evidence and that it should have been set aside. The appellee testified in that trial that he knew the gates at the crossing were not operated after six o'clock [illegible], so that he did not rely upon the gates for protection. There was no evidence of any wilful misconduct on the part of the servants of the appellant. Either was there any evidence that the appellant undertook to maintain a street light at the Taft Street crossing. We also held on the former trial that the more credible testimony warranted the conclusion that the appellee was not struck on the Taft Street crossing, but a considerable distance west of it on the private right of way of appellant; that if the jury had so found, the appellee could not have recovered a judgment for two reasons, there was a variance since each count of the declaration charged that the appellee was struck upon the crossing, and if he was struck at a considerable distance west of the crossing he was a trespasser and the company owed him no duty exce t to avoid wilfully injuring him after his presence was discovered. The evidence did not show a wilful injury. We also held that the jury should have found that the appellee was guilty of contributory negligence in carelessly going upon the other two tracks without looking eastward, after the train passed eastward, and that the negligence charged in the declaration was not proved.

Under this state of facts the finding of this Court [illegible] former appeal is binding upon us now and is the law in this case, except in so far as the evidence is different. The

difference in the testimony produced on the second trial is that several witnesses testified that the morning after the accident they went to the Taft Street crossing and saw blood stains upon the crossing and near one of the rails down to the point where the appellee was found. Four or five witnesses so testified. All of them testified at the first trial and none of them mentioned seeing blood spots at that time. The evidence further shows that it was very misty and the crossing was wet at the time of the accident; that during the night there was very heavy rain, so much that the next morning there were puddles of water along the ground. It is contended by appellant that the rain would have washed any blood stains away. The accident happened September 26, 1916. The second trial occurred in December 1923 more than seven years later. We are strongly inclined to believe that this testimony concerning the blood is an afterthought on the part of these witnesses which occurred to them following the holding of this Court that the evidence showed the appellee was not injured at the crossing but was injured west of it. Its purpose was to strengthen appellee's evidence in support of the allegation of the declaration that the accident occurred on the crossing. We are inclined to think that the testimony is not worthy of much credit. Without this testimony we are bound by our former holding that the appellee was struck west of the crossing; that he was a trespasser upon the private right of way of appellant and cannot recover except for wilful injury. There is now as upon the former trial no evidence of any wanton injury.

Our attention has been called to various conflicts in the testimony of witnesses who testified on behalf of appellee. The saloon keeper Gregory on the first trial testified that the appellee left his saloon a couple of seconds before appellee's cry for help was heard, while on the second trial he testified that appellee was out of the saloon a half hour before he heard his cry. There are other conflicting statements made by the witnesses, which very much weaken their testimony.

difference in the testimony produced on the second trial is that al witnesses testified that the morning after the accident they went to the Taft Street [illegible] and saw blood stains upon the crossing and near one of the rails down to the point where the appellee was found. Four or five witnesses so testified. All of them testified at the first trial and none of them mentioned seeing blood spots at that time. The evidence further shows that it was very misty and the crossing was wet at the time of the accident; that during the night there was very heavy rain, so much that the next morning there were puddles of water along the ground. It is contended by appellant that the rain would have washed any blood stains away. The accident happened September 26, 1916. The second trial occurred in December 1922 more than seven years later. We are strongly inclined to believe that this testimony concerning the blood is an afterthought on the part of these witnesses which occurred to them following the holding of this Court that the evidence showed the appellee was not injured at the crossing but was injured west of it. Its purpose was to strengthen appellee's evidence in support of the allegation of the declaration that the accident occurred on the crossing. We are inclined to think that the testimony is not worthy of much credit. Without this testimony we are bound by our former holding that the appellee was struck west of the crossing; that he was a trespasser upon the private right of way of appellant and cannot recover except for willful injury. There is now as upon the former trial no evidence of any wanton injury.

Our attention has been called to various conflicts in the testimony of witnesses who testified on behalf of [illegible]. The saloon keeper Gregory on the first trial testified that the appellee left his [illegible] a couple of seconds before appellee's cry for help was heard, while on the second trial he testified that appellee was out of the saloon a half hour before he heard his cry. There are other conflicting statements made by the witnesses, which very much weaken their testimony.

Among in

In the first trial a witness named Pagogna testified for the plaintiff. On the second trial it was claimed that this witness had gone to Italy and his evidence on the first trial over the objection of the appellant was read to the jury. Appellant claims that there was not sufficient foundation laid for the testimony. We are inclined to think that contention is correct. Pagogna's testimony is relied upon to some extent by both of the parties. The preliminary proof respecting the absence of Pagogna was made by the saloon keeper, Gregory, who testified that Pagogna had gone to Italy; that he himself later went there on a visit and saw Pagogna there and that he had not seen him since that time. There was no evidence that he was in Italy at the time of the trial or that he had not returned to the United States. Neither was there any evidence to show that his deposition could not be secured. The foundation was not sufficient to warrant the introduction of the evidence given on the former trial. (Stephens vs. Hoffman 275 Ill. 497.) We cannot say that it was not prejudicial in view of the fact that the appellee relied upon it to a great extent to support the verdict in this case. Appellant also relied upon it to some extent.

Complaint is made that a special interrogatory was submitted to the jury which assumed that the appellee was injured by appellant's train. The form of the interrogatory was "Was the plaintiff on the Taft Street crossing at the time he was struck by defendant's train?" We do not think there is great error in the form of this interrogatory. While it is true that it does assume that the plaintiff was struck by defendant's train, yet there is no other conclusion to be drawn from the evidence so that it could not have been prejucidial to the defendant.

Complaint is made of the third instruction given on behalf of the plaintiff. The instruction is "The Court instructs the jury that when it is said in these instructions that the plaintiff was required to exercise ordinary care for his own safety, it is meant that he was required to exercise that degree of care which an ordinarily prudent

In the first trial a witness named Ingogna testified for the plaintiff. On the second trial it was claimed that this witness had gone to Italy and his evidence on the first trial over the objection of the appellant was read to the jury. Appellant claims that there was not sufficient foundation laid for the testimony. We are inclined to think that contention is correct. Ingogna's testimony is relied upon to some extent by both of the parties. The preliminary proof respecting the absence of Ingogna was made by the saloon keeper, Gregory, who testified that Ingogna had gone to Italy; that he himself later went there on a visit and saw Ingogna there and that he had not seen him since that time. There was no evidence that he was in Italy at the time of the trial or that he had not returned to the United States. Neither was there any evidence to show that his deposition could not be secured. The foundation was not sufficient to warrant the introduction of the evidence given on the former trial. (Stephens vs. Hoffman 276 Ill. 497.) We cannot say that it was not prejudicial in view of the fact that the appellee relied upon it to a great extent to support the verdict in this case. Appellant also relied upon it to some extent.

Complaint is made that a special interrogatory was submitted to the jury which assumed that the appellee was injured by appellant's train. The form of the interrogatory was "Was the plaintiff on the Taft Street crossing at the time he was struck by defendant's train" We do not think there is great error in the form of this interrogatory. While it is true that it does assume that the plaintiff was struck by defendant's train, yet there is no other conclusion to be drawn from the evidence so that it could not have been prejudicial to the defendant.

Complaint is made of the third instruction given on behalf of the plaintiff. The instruction 2 "The Court instructs the jury, that when it is said in these instructions that the plaintiff was required to exercise ordinary care for his own safety, it is meant required to exercise that degree of care which an ordinarily prudent

person would exercise for his own safety before or at the time of receiving the injury under the same or similar circumstances." The objection is that the instruction limits the time of the defendant's care to the precise time of the injury and ignores the proposition that the plaintiff might have negligently placed himself in a position of peril which was the proximate cause of his injury. We do not think the instruction in its form contains that vice and it has been approved in other cases. (Walsh vs. C. C. Ry. Co. 303 Ill. 349; Chicago City Railway Co. Vs. O'Donnell 208 Ill. 273; South Chicago City Railway Co. vs. Kinnare 216 Ill. 456; Pierson vs. Lyon & Healy 243 Ill. 377.)

It is also insisted that the court wrongfully refused to give the 31st instruction for defendant which is in substance that if the plaintiff was struck on the right of way of defendant west of the Taft Street crossing the verdict should be for the defendant. The substance of that instruction is in the 30th instruction given for the appellant.

The appellant urges that the court erroneously permitted counsel to discuss the amount of his damages in his closing argument when it was not mentioned in his opening. The closing argument of counsel for plaintiff should be a reply to the argument of defendant's counsel and the discussion of new matters should as a rule be avoided. However, the trial court is clothed with a large discretion in such matters and his action will not be disturbed unless there is an obvious abuse of such discretion.

For the reasons herein pointed out, the cause must be reversed and remanded.

Reversed and Remanded.

[illegible] could exercise for his own safety before or at the time of [illegible]ing the injury under the same or similar circumstances." The objection is that the instruction limits the time of the defendant's care to the precise time of the injury and ignores the proposition that the plaintiff might have very gently placed himself in a position of peril which was the proximate cause of his injury. We do not think the instruction in its form contains that vice and it has been approved in other cases. (Welsh vs. [illegible] C. Ry. C. 308 Ill. 249; Chicago City Railway Co. vs. O'Donnell 208 Ill. 272; South Chicago City Railway Co. vs. Kimmere 216 Ill. 456; Pierson [illegible] Lyon & Healy 243 Ill. 277.)

It is also insisted that the court wrongfully refused to give the 31st instruction for defendant which is in substance that if the plaintiff was struck on the right of way of defendant west of the Tenth Street crossing the verdict should be for the defendant. The absence of that instruction is in the 20th instruction given for the appellant.

The appellant urges that the court erroneously permitted counsel to discuss the amount of the damages in his closing argument, for it was not mentioned in his opening. The closing argument of counsel for plaintiff should be a reply to the argument of defendant's counsel and the discussion of new matters should not be made. However, the trial court is clothed with a large discretion in such matters and his action will not be disturbed unless there is an obvious abuse of such discretion.

For the reasons herein pointed out, the cause must be reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Marie Swartz, Administratrix of the
Estate of George Swartz, deceased,
Appellee,

vs.

Chicago & North Western Railway Co.
a Corporation,
Appellant.

Appeal from
Circuit Court
of Kane County.

237 I.A. 660

Jones J.

This is a suit brought in the circuit court of Kane County by Maris Swartz, administratrix of the estate of George Swartz, deceased against the Chicago & North Western Railway Company to recover damages for his death alleged to have been caused by the negligence of the defendant, while said deceased was in its employ and engaged in interstate commerce. There was a trial before a jury resulting in a verdict for the plaintiff for $19,000 upon which the Court entered judgment after overruling a motion for a new trial.

The declaration charged that the defendant was engaged in interstate commerce and operating a line of railroad from Elgin to and through Carpentersville, Illinois; that Oscar Nelson, as receiver, operated the Fox River division of the Aurora, Elgin and Chicago Railroad, including an electric street railway and an electric lighting and power system with certain lines of poles and wires over which he transmitted, sold and delivered electric power and current. This power line paralleled the line of the defendant company's railroad on the east side thereof. The lines ran through Trout Park, a summer resort located upon the Fox River and on the west side of defendant's right of way. On May 29th, 1922, one Edward Behm, who occupied a tent at Trout Park made application to the receiver for electric current at this tent. Thereupon an electric wire was strung from the Aurora, Elgin and Chicago line across the defendant's right of way to Behm's tent to supply electric current for his use. This wire was placed only 18 feet above defendant's track and so remained until the injury to the plaintiff's intestate on June 5th, 1922. In the early morning of that day, while plaintiff's intestate was riding on top of one of defendant's cars and engaged in the line of his duty and was in the exercise of ordinary care for his own

Merle Swartz, Administratrix of the
Estate of George Swartz, deceased,
Appellee,

vs.

Chicago & North Western Railway Co.
a Corporation,
Appellant.

Appeal from
Circuit Court
of Lake County.

297 I.A. 660

Jones J.

This is a suit brought in the circuit court of Lake County Merle Swartz, administratrix of the estate of George Swartz, deceased, against the Chicago & North Western Railway Company to recover damages for his death alleged to have been caused by the negligence of the defendant, while said deceased was in its employ and [illegible] in interstate commerce. There was a trial before a jury resulting in a verdict for the plaintiff for $12,000 upon which the court entered judgment after overruling a motion for a new trial.

The declaration charged that the defendant was engaged in interstate commerce and operating its railroad from Elgin to [illegible] through Carpentersville, Illinois; that Duane Wilson, a tenant [illegible] operated the Fox River division of the Chicago, Milwaukee & Chicago Railroad, including an electric street railway and an electric lighting and power system with certain lines [illegible] which he transmitted, sold and delivered electric [illegible] current. This power line paralleled the line of the defendant company and [illegible] road on the east side thereof. The lines ran through [illegible] summer resort located upon the Fox River and on the [illegible] defendant's right of way. On May 6th, 1922, one Frank Hahn, occupied a tent at Trout Park made application to the defendant for electric current at this tent. Thereupon an electric [illegible] strung from the Aurora, Elgin and Chicago line across [illegible] right of way to Hahn's tent to supply electric current [illegible] This wire was placed only 18 feet above defendant's [illegible] remained until the injury to the plaintiff's intestate on June 1922. In the early morning of that day, [illegible] was riding on top of one of defendant's cars and [illegible]

of his duty and was in the exercise of ordinary care for his own safety, he collided with said service wire and was thrown from the car to the ground receiving injuries from which he died the same day. He left surviving a widow, plaintiff herein, and son George Swartz, twelve years of age.

The declaration consisted of five counts each containing the foregoing averments, but each count contained distinct charges of negligence. The first count charged that the defendant knew or in the exercise of ordinary care should have known of the presence and danger of said service wire for a sufficient length of time to have removed it prior to the accident but negligently permitted it to remain in position. The second count charged that the defendant negligently and carelessly failed to inspect its railway and right of way for the purpose of discovering obstructions and dangers thereon including said service wire. The third count charged that the engineer and fireman of the train on which plaintiff's intestate was riding carelessly and negligently failed to keep a lookout ahead of said service wire. The fourth count charged that the defendant's section foreman and section men failed to exercise reasonable care to ascertain the presence of said service wire and remove it. Count five charged generally that the defendant negligently and carelessly inspected, maintained and operated its said railway and right of way and that by reason thereof plaintiff's intestate was killed.

The defendant filed a plea of the general issue and a special plea setting forth that it did not own, operate or control the wire mentioned in the declaration; that it had no knowledge or notice that said wire had been so strung across its right of way and that said wire was so strung by strangers without its knowledge, consent or license and that neither prior to nor at the time of the injury to the plaintiff's intestate did the defendant have any knowledge or notice of the existence of the wire. To this special plea the plaintiff filed a replication setting up that although defendant did not own, or operate the wire and that it was so strung by strangers, without defendant's knowledge, consent or license, yet the defendant did have

of his duty and was in the employ of [illegible] ty care for his own safety, he collided with said service wire [illegible] was thrown from the car to the [illegible] and son George [illegible], twelve years of age.

The declaration consisted of five counts [illegible] foregoing averments, but each count contained negligence. The first count charged that the [illegible] the exercise of ordinary care should have known of the presence [illegible] danger of said service wire for a sufficient length of time to have removed it prior to the accident but negligently permitted it to remain in position. The second count charged that the defendant negligently and carelessly failed to inspect its railway [illegible] way for the purpose of discovering obstruction [illegible] including said service wire. The third count charged that the engineer and fireman of the train on which plaintiff's intestate was riding carelessly and negligently failed to keep a lookout ahead of said service wire. The fourth count charged that the defendant's section foreman and section men failed to exercise reasonable care to ascertain the presence of said service wire [illegible] five charged generally that the defendant negligently and [illegible] inspected, maintained and operated its said railway [illegible] and that by reason thereof plaintiff's intestate [illegible] killed.

The defendant filed a plea of the general issue [illegible] plea setting forth that it did not own, [illegible] or control the [illegible] mentioned in the declaration; that it had no [illegible] or horses [illegible] said wire had been so strung across its tracks [illegible] but the wire was so strung by strangers without its [illegible] license, so [illegible] license and that neither prior to nor at the time of [illegible] the plaintiff's intestate did the defendant have any [illegible] notice of the existence of the wire. To this [illegible] filed a replication setting up that although defendant [illegible] operate the wire and that it was so strung by strangers, it [illegible] ant's knowledge, consent or license, yet the [illegible] had had have

knowledge or notice or in the exercise of ordinary care, might have had knowledge or notice of the stringing of said wire and in the exercise of ordinary care might have had control over said wire so as to remove or alter it. Issue was joined upon the replication and the plea of the general issue.

Upon the trial of the cause, the plaintiff introduced in evidence thirty-three rules of the defendant company for the guidance of its employees in the performance of their duties. The major portion of these rules does not apply to the duties of the employees of the defendant with respect to the obstruction and removal of overhead obstructions on the right of way, which might be dangerous to the employees of the company.

The defendant especially objects to the admission of Rules 1045, 1181 and 1188. Rule 1045 provides that the duties of the engine men are to "Keep a vigilant lookout at all times, particularly when passing around curves, through stations and yards' and must frequently look back to see that no portion of the train has become detached or derailed, also for any signals that may be given by trainmen or others. They must not be so occupied as to prevent themselves or firemen from keeping a constant lookout the entire trip. Rules 1181 and 1188 govern the duties of track foremen. They provide that the foremen must send a reliable and competent man over their sections at least once daily, carefully note the condition of track, roadbed, bridges, culverts, fences, cattle guards, etc., and know that everything is safe for the passage of trains, examine the line wires each day and if they are crossed or obstructed repair temporarily, when possible, and report the conditions to the chief train dispatcher, and examine each day the whips and warning guards for overhead structures, repair when possible and report defects to the road master.

There was no evidence in the record to show what the engineer and fireman were doing at the time of the accident, which occurred in the early morning before it was fully daylight. There was therefore no evidence upon which to base the introduction of Rule 1045. We think, however, that rules 1181 and 1188 were properly admitted. (L.

knowledge or notice or in the exercise of ordinary care, might have [illegible] knowledge or notice of the existence of said wire and in the [illegible] of ordinary care might have had control over said wire so as to remove or alter it. Issue was joined upon the negligence and the plea of the general issue.

Upon the trial of the cause, the plaintiff introduced in evidence thirty-three rules of the defendant company for the guidance of the employees in the performance of their duties. The major portion of these rules does not apply to the duties of the employee of the defendant with [illegible] obstructions on the right of way, which might be dangerous to the employees of the company.

The defendant especially objects to the admission of Rules 1048, 1181 and 1188. Rule 1048 provides that the duties of the [illegible] are to "Keep a vigilant lookout at all times, particularly when passing around curves, through stations and yards and more frequently look back to see that no portion of the train has become detached or derailed, also for any signals that may be given by train men or others. They must not be so occupied as to prevent themselves [illegible] from keeping a constant lookout the entire trip." Rule 1181 [illegible] govern the duties of track foremen. They provide [illegible] must send a reliable and competent man over their sections on least once daily, carefully note the condition of track, [illegible] culverts, fences, cattle guards, etc., and know that overhead bridges are for the passage of trains, examine the line where [illegible] and if they are crossed or obstructed report temporarily, make [illegible] and report the conditions to the office track disposition, [illegible] each day the whips and warning guards for overhead structures, remain where possible and report defects to the road [illegible]

There was no evidence in the record [illegible] and firemen were doing at the time of the accident, [illegible] in the early morning before it was fully daylight. [illegible] no evidence upon which to base the introduction of Rule 1048. I think, however, that rules 1181 and 1188 were properly admitted. [illegible]

S. & M.S. Co. v. Ward 135 Ill. 511; Chicago & Alton R.R. Co. v. Eaton 194 id. 441.) Only rules applying to overhead obstructions or duties of employees which, if properly performed might reasonably be expected to lead to the discovery of the wire and rules governing the duties of Conductor Swartz should have been admitted in evidence.

The Court admitted over the objection of the defendant the testimony of a large number of witnesses to the effect that they saw the wire in question as soon as it was placed in position. All of these witnesses, however, testified that they did not bring notice of the stringing of the wire to any of the employees or agents of the defendant company. It is urged that since notice was not brought to the defendant by any of these witnesses the admission of their testimony served only to prejudice the rights of the defendant before the jury without tending to prove any issue in the case. We are inclined to think that this testimony is admissible for the purpose of showing that the wire was in plain view, and that the defendant had notice of the position of the wire, or in the exercise of reasonable care might have known it. This was one of the issues joined in the case. It will be remembered that the evidence discloses that the wire remained in its dangerous position for five days during which time employees of the defendant worked along the right of way at this point.

The case of the City of Ottawa v. Hayne 214 Ill. 45 is very similar to the case at bar in that respect. Recovery was sought for injuries sustained by the plaintiff when, because of darkness, he ran into a rope stretched across the sidewalk of the defendant city. The testimony of witnesses who had seen the rope during the previous day was admitted to show constructive notice to the city. The Court held this testimony admissible.

It is next urged that the Court erred in admitting evidence that three men were working on the right of way of the defendant company during the time that the witness F. H. Freyer was stringing the wire in question across the right of way. The ground of the objection is that there is no proof that these men were in any way connected with the defendant company. The witness Charlotte Young

[illegible] & N.S. Co. v. Ward 165 Ill. 511; Chicago & Alton R.R. Co. v. Dutton 154 Ill. 41.) Only rules applying to overhead obstructions or duties of employees which, if properly performed might reasonably lead to the discovery of the wire and rules governing the duties of Conductor Swarts should have been admitted in evidence.

The Court admitted over the objection [illegible] many of a large number of witnesses to the [illegible] in question as soon as it was placed in position. All or [illegible] nesses, however, testified that they did not bring notice to the attaching of the wire to any of the employees or agents [illegible] ent company. It is urged that since notice was not brought to the defendant by any of these witnesses the admission of their testi[illegible] served only to prejudice the rights of the defendant before the [illegible] without tending to prove any issue in the case. We are inclined think that this testimony is admissible for the purpose of [illegible] that the wire was in plain view, and that the defendant [illegible] of the position of the wire, or in [illegible] might have known it. This was one of the issues joined in the case. It will be remembered that the evidence tends to show that the wire remained in its dangerous position for five days during [illegible] time employees of the defendant worked along the right of [illegible] at this point.

The case of [illegible] the City of Ottawa v. Hayes 114 [illegible], is very similar to the case at bar in that respect. Recovery was [illegible] for injuries sustained by the plaintiff when [illegible] of [illegible], he ran into a rope stretched across the sidewalk of the defendant city. The testimony of witnesses who had seen the [illegible] the previous day was admitted to show constructive notice [illegible] city. The Court held this testimony admi[illegible]

It is next urged that the Court erred in admitting evidence that three men were working on the right of [illegible] of the [illegible] company during the time that the witness [illegible] Proved [illegible] the wire in question across the [illegible] The gravamen [illegible] objection is that there is no proof that [illegible]

identified defendant's witness Van Auken, who testified that he was a section foreman in charge of that portion of the defendant line as one of the three men. While he denied that he was there while the wire was being strung, nevertheless, the testimony became competent and whether Van Auken was there became a question of fact for the jury. If he were there that fact is clearly competent for the purpose of showing notice.

Complaint is made of the refusal to give defendant's instructions numbered three and six, which instructed the jury that there was no evidence in the case upon which the jury could find the defendant guilty upon the basis of actual notice of the position of the wire. It is true that the employees of the defendant company denied seeing the wire but it is also true that they admitted having passed back and forth under it and that it could be seen from the grade by looking straight ahead. There is also the evidence tending to show that the employee Van Auken was at that point while the wire was being strung. There was therefore evidence from which the jury might have found actual notice and the instructions were properly refused.

Complaint is also made of the refusal to give instruction number five which told the jury that the defendant company was under no obligation to anticipate the acts of trespassers in creating dangerous conditions upon its right of way but that the only duty of the defendant company was to "exercise ordinary care at all times to keep its roadbed and equipment in reasonably safe condition." These points were fully covered in other instructions given on behalf of the defendant. Defendant's instruction number two was properly refused, because it tells the jury that the appellant was under no duty to inspect the space above its tracks in an effort to locate wires, which might be placed there without its knowledge, acquiescence or consent, unless some fact or circumstance came to its attention, such as would cause a reasonably prudent person, under the same or similar circumstances, to make an inspection which would naturally result in the discovery of such wires." This instruc-

[illegible] tified defendant's witness Van Auken, who testified that he [illegible] position foreman in charge of that section of the defendant line [illegible] of the three men. While he denied that he was there while the [illegible] wire was being strung, nevertheless, the testimony became [illegible] and whether Van Auken was there became a question of fact [illegible] jury. If he were there that fact is clearly competent for [illegible] purpose of showing notice.

Complaint is made of the refusal to give defendant's [illegible] numbered three and six, which instructed the jury that [illegible] evidence in the case upon which the [illegible] could find the [illegible] liability upon the basis of actual no[illegible] of the [illegible]. It is true that the employees of the defendant [illegible] the wire but it is also true that they admitted having [illegible] forth under it and that it could be seen from the [illegible] ing straight ahead. There is also [illegible] evidence tending to [illegible] that the employee Van Auken was at that point while the [illegible] being strung. There was therefore evidence from which the [illegible] might have found actual notice and the instructions were [illegible] refused.

Com[illegible] number five which told the jury that the defendant com[illegible] under no obligation to anticipate the [illegible] ing dangerous conditions upon [illegible] duty of the defendant company was to "exercise [illegible] lines to keep its poles and equipment in [illegible] These points were fully covered in other instructions given [illegible] of the defendant. Defendant's instruction number [illegible] refused, because it tells the jury that the defendant was [illegible] duty to inspect the space above its [illegible] wires, which might be placed there without [illegible] sence or consent, unless some fact or circumstance came to [illegible] attention, such as would cause a reasonable prudent [illegible] the same or similar circumstances, to [illegible] would naturally result in the [illegible] of such [illegible]

tion ignores the duty of the defendant to use reasonable care to keep its right of way in a reasonably safe condition for its employees with respect to overhead obstructions and it was therefore properly refused.

The substance of refused instruction number four is contained in other given instructions.

It is argued at length that appellee's given instruction five is erroneous and with that contention we agree. This instruction directs a verdict. It tells the jury that it was the duty of the appellant to exercise reasonable care to furnish plaintiff's intestate a reasonably safe place to work and that it was also appellant's duty to use reasonable care and caution to discover and remove any wires or obstructions on or over its right of way dangerous to the life or safety of its employees. It then purported to state all of the facts which, if proven, would authorize a verdict for the plaintiff and in so doing used this language; ". . . and if you believe from a preponderance of the evidence under the instructions of the court that the defendant was guilty of the negligence with respect to said wire charged in plaintiff's declaration or any count thereof and if you believe from the evidence either that the defendant the Chicago & North Western Railway Company should have learned of the presence and position of said wire in the exercise of reasonable care, or that the defendant knew thereof in time to have remedied or removed said wire before the injury complained of, then in either of such cases, if you believe from the evidence that the defendant negligently failed so to do as charged in plaintiff's declaration or any count thereof and if you further believe that plaintiff's intestate George Swartz came to his death by reason thereof, is so shown by the evidence and if you believe from a preponderance of the evidence that George Swartz, plaintiff's intestate, was himself at and at all times prior to the time in question in the exercise of reasonable care for his own safety then in such case if so shown by the evidence, the defendant would be liable and you should find the defendant guilty." There is no showing that the declaration went to the jury and it will be

tion ignores the duty of the defendant to use reasonable care to keep its right of way in a reasonably safe condition for the employees with respect to overhead obstructions and it was therefore properly refused. Being such

and. The substance of refused instruction number four is contained in other given instructions.

[illegible] It is argued at length that appellee's given instruction five is erroneous and with that contention we agree. This instruction directs a verdict. It tells the jury that it was the duty of the appellant to exercise reasonable care to

[illegible] maintain a reasonably safe place to work and that it was the plaintiff's duty to use reasonable care and caution to discover and remove any wires or obstructions on or over its right of way dangerous to the life or safety of its employees. It then [illegible] ed to state all of the facts which, if proven, would authorize a verdict for the plaintiff and in so doing used this language: . . . and if you believe from a preponderance of the evidence under the instructions of the court that the defendant was guilty of the negligence with respect to and

declaration or any count thereof and if you believe from the evidence either that the defendant the Chicago & North Western Railway Company should have learned of the presence of a postal [illegible] wire in the exercise of reasonable care, or that the defendant knew thereof in time to have remedied or removed it before the injury complained of, then in either of [illegible] you believe from the evidence that the defendant [illegible] so to do as charged in plaintiff's declaration or in some count thereof and if you further believe that plaintiff's [illegible] death came to his death by reason thereof, is [illegible] and if you believe from a preponderance [illegible] evidence, plaintiff's intestate, not himself [illegible] to the time in question in the exercise of reasonable care for his own safety then in such case it is [illegible] by the [illegible] defendant would be liable and you should find the defendant guilty. There is no showing that the declaration went to the jury [illegible] be

presumed in the absence of such showing that the court did not permit the pleadings to be taken by the jury, when they retired to consider their verdict. (Bernier v. Illinois C.C. R.R. Co. 296 Ill. 464; Lalette v. Director General of Railroads 306 Ill. 348-355.) There is no other instruction in the case which tells the jury what negligence is charged in plaintiff's declaration. An instruction which directs a verdict must limit the jury to the negligence charged in plaintiff's declaration. ~~An instruction which directs a verdict must limit the jury to the negligence charged in the declaration.~~ (Herring v. C. & A. R.R. Co. 299 Ill. 214.) If the jury did not know what negligence was charged in the declaration, it was not limited by this instruction and might find the defendant guilty of negligence not charged in the declaration. The instruction is therefore erroneous in that particular and the giving of such instruction is held to be reversible error where the evidence is close and conflicting. (Ratner v. Chicago City Railway Co. 243 Ill. 169; Hackett v. Chicago City Railway Co. 235 id. 116; Lyons v. Ryerson & Son 242 id. 409; Grifenhan v. Chicago Railways Co. 299 id. 590.)

The instruction Number 6, while it does not direct a verdict, also refers the jury to the declaration for the negligence charged against the defendant. This it should not have done.

Appellant also urges that the court was in error in overruling its motion to instruct the jury to find the appellant not guilty of the negligence charged in the third count of the declaration. This count charges that the engineer and fireman were guilty of negligence in failing to keep a lookout ahead for the wire, which caused the death of plaintiff's intestate. There is to be found in the record no evidence whatever direct or circumstantial of what the engineer and fireman were doing at the time of the accident, and in the absence of such evidence the court should have granted the motion, and given the instruction.

It is also urged that the Court should have directed a verdict upon appellant's motion at the close of plaintiff's evidence and also at the close of all the evidence. The rule is that the court

presumed in the absence of such showing that the court did not permit the pleadings to be taken by the jury, when they retired to consider their verdict. (Bernier v. Illinois [illegible] 111. 464; [illegible] v. Director General of Rail[illegible] 355.) There is no other instruction in [illegible] jury what negligence is charged in plaintiff's [illegible] instruction which directs a verdict must limit the jury to the negligence charged in plaintiff's [illegible]

If the jury did not know what negligence [illegible] the [illegible] tion, it was not limited by this instruction [illegible] defendant guilty of negligence not charged in [illegible] instruction is therefore erroneous [illegible] of such instruction is held to be reversible [illegible] is close and conflicting. (Hanson v. [illegible] 111. 109; Hackett v. Midwest Utility [illegible] v. Hyerson & Son 242 [illegible] 409; Trafenbach v. [illegible] 299 id. 590.)

The instruction Number 6, [illegible] also refers the jury to the declaration [illegible] against the defendant. This it should [illegible]

Appellant also urges that the court [illegible] its motion to instruct the jury [illegible] of the negligence charged in [illegible] This count charges that the engineer [illegible] negligence in failing to keep a lookout [illegible] caused the death of plaintiff's intestate. [illegible] in the record no evidence whatever [illegible] what the engineer and fireman saw [illegible] and in the absence of such evidence [illegible] the motion, and given the instruction.

It is also urged that the court should [illegible] upon appellant's motion at the close of [illegible] also at the close of all the evidence. The

should not direct a verdict in favor of the plaintiff, if there is any evidence in the record which standing alone fairly tends to support the allegations in plaintiff's declaration. (Libby, McNeill and Libby v. Cook 222 Ill. 206; City of Chicago v. Jarvis 226 Id. 614.) In our opinion the evidence required the court to overrule the motion and deny the peremptory instruction.

For the reasons indicated this cause must be reversed and remanded to the circuit court of Kane County for a new trial.

Reversed and Remanded.

should not direct a verdict in favor of the plaintiff, if there is any evidence in the record which standing alone fairly tends to support the allegations in plaintiff's declaration. (Abbey, Nemoff and Libby v. Good 222 . 206; City of Chicago v. Jarla 226 id. 624.) In our opinion the evidence required the court to overrule the motion and deny the peremptory instruction.

For the reasons indicated this cause must be reversed and remanded to the circuit court of Kane County for a new trial.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 14 General No. 7380

Abraham S. Berg, et al,
appellants,

vs.

J. D. Annenberg, et al,
appellees,

Appeal from the City Court
of Aurora.

237 I.A. 660

Jones, J.

The appellants filed this suit in the city court of Aurora, against the appellees, to recover the sale price of a shipment of percale sent from Boston to the appellees in Aurora. The case was tried before the court without a jury. At the close of the appellant's evidence the court, upon motion of the appellees, entered an order dismissing the suit. From that judgment this appeal is taken.

The appellees are a partnership doing business in the city of Aurora. On June 30, 1920, they gave appellants' travelling salesman a written order for a quantity of dry goods. The order contained the following provisions: "All orders, contracts and agreements must be wholly in writing and can only bind this company when accepted by it at Boston, Massachusetts." On July 6, 1920, the appellants wrote appellees as follows:

> "We acknowledge receipt of your kind order through our Mr. Wolfstein, for which kindly accept our thanks.
> We are making shipment to-day of a few styles and find that we shall have to substitute on some of the patterns you selected as our stock is broken up on the open goods at the present time.
> However, the selection will be of very good patterns for the apron trade which we believe is what you want."

With this letter the appellants enclosed an invoice of goods shipped F.O.B. Boston for 1875 yards of assorted Belmar Percale at 29¢ a yard. Appellees' order was for one-half case (1000 yards) of this class of goods to be thirty six inches wide.

Appeals No. 14 General No. 7580

Abraham S. Berg, et al,

appellants,

Appeal from the Ci

vs.

of Aurora.

I. D. Ammenberg, et al,

appellees,

Jones, J.

The appellants filed this suit in the city court of Aurora, against the appellees, to recover the sale price of a shipment of percale sent from Boston to the appellees in Aurora. The case was tried before the court without a jury. At the close of the appellant's evidence the court, upon motion of the appellees, entered an order dismissing the suit. From that judgment appeal is taken.

The appellees are a partnership business in the city of Aurora. On June 30, 1920, they gave appellants' travelling salesman a written order, which contained the following provisions: "All orders, contracts and agreements must be wholly in writing and can only bind this company when accepted by it at Boston, Massachusetts." On July , 1920, the appellants wrote appellees as follows:

> "We acknowledge receipt of
> kind order through our Mr.
> for which kindly accept our
> We are making shipment t
> few styles and find that we
> to substitute on some
> you selected as our st
> up on the open goods at
> time.
> However, the se cotton will be of
> very good patterns for the spring trade
> which we believe is what you want."

With this letter the appellants enclosed an invoice of goods shipped F.O.B. Boston for 1875 yards of assorted fancy percale at 29¢ a yard. Appellees' order was for one-half case (1000 yards) of this class of goods to be thirty six inches wide.

The invoice did not show the width of the goods. To this letter appellees replied on July 13th:

> "We are in receipt of your invoice of July 8th, for one case of Belmare percale. However our order of June 30th, calls for a total of three cases, as purchased through your Mr. Wolfstein of Chicago.
> Please advise if you can make immediate shipment of the balance so that we will know just what to expect."

To this letter the appellants replied on July 15th, that the balance of the shipment would go forward within a week. On August 2nd, the appellees telegraphed appellants as follows:

> "Cancel balance of shipment due to your failure to ship as per yours fifteenth. Had to purchase where we could get prompt shipmen t."

On August 19th appellees wrote the appellants asking them to trace the case of percale shipped on July 8th. On August 30th the appellees wrote the appellants:

> "We were very patient in waiting the arrival of this case of material, and due to the fact that this order was placed with your representative Mr. Wolfstein in Chicago two months ago promising shipment within two weeks, we were obliged to replace same.
> We therefore request you to kindly place this invoice to our credit, as we will refuse to accept same and assume the loss we would otherwise have to take on account of non-arrival of the goods within reasonable length of time."

The appellants returned the invoice to the appellees but retained the bill of lading. They also notified appellees they would not accept a return of the goods.

The shipment which had gone astray, through no fault of the shipper, reached the appellees on September 8th. They then wrote asking for a reduction of five cents per yard in price, stating that if they did not obtain the reduction they would return the goods. Several letters and telegrams were exchanged on this subject, before September 25th, at which time the appellees returned the goods to the appellants who refused to

receive them. The contentions of the appellants are that the shipment of a part of the goods followed by a letter, from the buyer countermanding the remainder of the order constituted a novation and that the original contract was no longer in force, but there was a new agreement for the sale of 1875 yards of percale; that the goods were shipped by them and delivery to the railroad constituted delivery to the buyer so that the appellants were not responsible for the delay in delivery. Appellants further contended that the remedy of the buyer then was against the railroad company.

The appellees, however, contend that since the proof by appellants does not show compliance with the order as given because ~~of~~ the shipment contained 875 yards more of the percale than was ordered and because there was no proof that it was thirty-six inches wide; that this, under the Sales Act, gave appellees a right to refuse the goods when shipped.

The case was apparently tried in the lower court by counsel for both parties upon the theory that the original order in the first instance constituted a complete contract. Their difference is that the appellants contend there was a novation while the appellees claim there was none.

The original order being subject to acceptance by the caller constituted only an offer to buy and in order to make a complete contract must be accepted by the seller upon the precise terms contained in the order. (Davis v. Fidelity Fire Ins. Co. 208 Ill. 375; Scott v. Fowler 227 Ill. 104; El Reno Grocery Co. v. Stocking 293 Ill. 494). Appellants' letter of July 8th did not accept the offer in terms but instead constituted a counter offer to sell 1875 yards of Belmar percale at 29¢ a yard and other goods in substitution for those which appellants did not have in stock. There can be no question that at this point the appellees might have refused the shipment of percale because it was not in the amount ordered and because the remainder of the

receive them. The contentions of the appellants are that the [illegible]

[illegible]

movation [illegible]

but there was a new agreement for the sale of 1875 yards of percale; that the goods were shipped by them and delivery to the railroad constituted delivery to the buyer so that the appellants were not responsible for the delay in delivery. Appellants further contended that the remedy of the buyer then was against the railroad company.

The appellees, however, contend that since the proof by appellants does not show compliance with the order as given because the shipment contained 875 yards more of the percale than was ordered and because there was no proof that it was thirty-six inches wide; that this, under the Sales Act, gave appellees a right to refuse the goods when shipped.

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order was not filled, but appellees did not choose to do that. Their reply inquiring when shipment was made substituting patterns evidence an intention to accept the percale actually shipped. So too, their letter of August 2nd, countermanding the balance of the order as given operated as a severance of the offer such that it was accepted as to the 1875 yards of percale. This is further emphasized by their later letter in the month of August asking that a tracer be sent to locate the stray shipment. The action of the appellants in shipping a portion of the order and substituting as to the others did not form a contract, but constituted a new offer. This new offer included the shipment of the goods in question. Appellees' letters cancelling the remaining portion of the orders in effect constituted an acceptance of the goods actually shipped and appellees became bound to pay for them. We do not think that the fact that the goods were forwarded before the actual acceptance of the substituted order by the appellees changed the rule that the railroad company was the agent of the consignee and that delivery to the railroad was delivery to the consignee. All documents in the case contemplated shipment F.O.B. Boston. If we are correct in this conclusion, the goods became the property of the appellees and their remedy for the delay in shipment is not against the consignor but against the railroad.

The cause will be reversed and remanded to the city court of Aurora for a new trial.

Reversed and Remanded.

order was not filled, but appellees did not choose to do that. Their reply inquiring when shipment was made substituting patterns evidence an intention to accept the peroxale actually shipped. So too, their letter of August 2nd, countermanding the balance of the order as given operated as a severance of the offer such that it was accepted as to the 1875 yards of peroxale. This is further emphasized by their later letter in the month of August asking that a tracer be sent to locate the stray shipment. The action of the appellants in shipping a portion of the order and substituting as to the others did not form a contract, but constituted a new offer. This new offer included the shipment of the goods in question. Appellees' letters cancelling the remaining portion of the orders in effect constituted an acceptance of the goods actually shipped and appellees became bound to pay for them. We do not think that the fact that the goods were forwarded before the actual acceptance of the substituted order by the appellees changed the rule that the railroad company was the agent of the consignee and that delivery to the railroad was delivery to the consignee. All documents in the case contemplated shipment F.O.B. Boston. If we are correct in this conclusion, the goods became the property of the appellees and their remedy for the delay i shipment is not against the consignor but against the railroad.

The cause will be reversed and remanded to the city court of Aurora for a new trial.

Xil. Vol. xxxv. p. Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 20. General No. 7390

Champion Milling & Grain Co.,

appellant,

vs.

F. J. Simater,

appellee,

Appeal from County Court of Woodford County.

237 I.A. 660

Jones, J.

This suit was begun before a justice of the peace, where a judgment was rendered in favor of appellant. From this judgment, an appeal was taken to the county court of Woodford County. Upon the trial in that court, a judgment was entered in favor of appellee, Simater, pursuant to his motion for a directed verdict at the conclusion of the plaintiff's evidence.

The appellant Grain Company is a corporation with its principal place of business in Clinton, Iowa. On August 15th, 1922, through one of its salesmen, it took an order from the appellee for a carload of chicken feed. Appellee was located at Minonk, Illinois. Under the terms of the written order, shipment was to be made September 15th, 1922 and the appellee had the right to change the order, if he so desired. On September 4th, appellee exercised his privilege of changing the order and asked that the shipment be made immediately, instead of September 15th. The car containing the shipment was loaded about September 11th, and a bill of lading was issued on the 12th. The shipment did not reach Minonk until September 28th. The evidence tends to show that the car, in which the shipment was made, was in bad condition at the time it was loaded and its delay in reaching its destination was due to the necessity of making repairs.

The shipment was consigned by appellant at Clinton, Iowa to itself at Minonk, Illinois. A uniform bill of lading was issued with the direction to notify the Minonk Produce Company,

Iowa No. 35. General No. 7290

Grain Company

Co.,

Appellant,

vs.

J. J. Simster,

Appellee.

Appeal from County Court

of Woodford County.

Iowa, J.

The writ was issued [illegible] a judgment was [illegible] ment, an appeal [illegible] Upon the trial in that court, a judgment was entered in favor of appellee, Simster, pursuant to his motion for a directed verdict at the conclusion of the plaintiff's evidence.

The appellant Grain Company is a corporation with its principal place of business in Clinton, Iowa. On August 16th, 1922, through one of its salesmen, it took an order from the appellee for a carload of chicken feed. Appellee was located at Minonk, Illinois. Under the terms of the written order, shipment was to be made September 15th, 1922 and the appellee had the right to change the order, if he so desired. On September [illegible]th, appellee exercised his privilege of changing the order and asked that the shipment [illegible]

The car containing the shipment was loaded about Sep[illegible] and a bill of lading was issued on the 12th. The shipment did not leave Clinton [illegible] delay in the shipment [illegible] condition of the [illegible] destination was due to the necessity of making repairs.

The shipment was consigned by appellant at Clinton, Iowa to itself at Minonk, Illinois. A uniform bill of lading was issued [illegible]

the style under which appellee was doing business. Attached to the bill of lading was a sight draft against the Minonk Produce Company for $791.50, in favor of the appellant Grain Company. Considerable correspondence passed between the parties concerning the delay in the receipt of the shipment and on September 22, 1922 appellee sent a telegram to appellant stating that if the car did not arrive by to-morrow, the shipment could not be used. Appellant communicated with appellee endeavoring to induce him to accept the shipment when it arrived. On September 25th, the shipment not having arrived, appellee again notified appellant by letter that he would not accept the shipment because of the delay. This suit was brought by the Grain Company against appellee for the purpose of recovering damages because of the refusal of appellee to accept the shipment and to honor the sight draft hereinbefore mentioned.

We would be justified in affirming the judgment in this cause on account of the insufficiency of the abstract and the failure of appellant to comply with the rules of this court with reference to the preparation of an abstract. However, we have given our best attention to the case upon its merits. It is the contention of appellant that the shipment of feed became the property of appellee when it was delivered to the railroad company at Clinton, Iowa and that appellee must look to the railroad company for whatever damages were occasioned by reason of the delay in transportation. With this contention we cannot agree. The shipment was consigned by appellant to itself and not to appellee. The "uniform order bill of lading" and the sight draft were sent to a bank at Minonk. The order given for the feed provided that the shipment was to be delivered at Minonk and appellant was to pay the freight. By reason of this situation, the title to the shipment was retained in appellant and could not vest in appellee until he had honored the

draft by payment. This question of title is governed by Rule 5 of Section 19 of the Uniform Sales Act, which provides that: "If the contract to sell requires the seller to deliver the goods to the buyer or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." It is therefore apparent that appellee was not the owner of the shipment in question, but that appellant was the owner subject to the right of the appellee to become the owner upon the payment of the draft and the delivery of the shipment to him by the railroad company at Minonk.

There is no disagreement between the parties about the delay being unusual and unreasonable. The controversy is solely as to which one of the parties ought to bear the loss. We think, under the undisputed evidence in this case, the question of ownership was one of law and that question having been rightly determined in favor of the appellee, the court properly gave a peremptory instruction in his favor.

Questions concerning the ruling of the court as to the admissibility of evidence have been raised but the abstract is so meager that we cannot pass upon questions involved without a search of the record and this we cannot do. (Village of Desplaines v. Winkleman, 270 Ill. 149; Jackson v. Winans, 287 id. 386.) But notwithstanding our inability to search the record, our view of the law applicable to this case, makes the question concerning the admissibility of the proposed testimony of no materiality, because such evidence seems to relate only to the question of damages. Inasmuch as we have reached the conclusion that no damages can be assessed against appellee the testimony above referred to was irrelevant. The judgment in this case is affirmed.

Judgment Affirmed.

draft by payment. This question of title is governed by Rule 5 of Section 19 of the Uniform Sales Act, which provides that: "If the contract to sell required the seller to deliver the goods to the buyer or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." It is therefore apparent that appellee was not the owner of the shipment in question, but that appellant was the owner subject to the right of the appellee to become the owner upon the payment of the draft and the delivery of the shipment to him by the railroad company at Minonk.

There is no disagreement between the parties about the delay being unusual and unreasonable. The controversy is as to which one of the parties ought to bear the loss. Under the undisputed evidence in this case, the question of ownership was one of law and that question having been determined in favor of the appellee, the court properly gave a peremptory instruction in his favor.

Questions concerning the ruling of the court as to the admissibility of evidence have been raised but the abstract is so meager that we cannot pass upon questions involved without a search of the record and this we cannot do. (Village of Plaines v. Kinkleman, 270 Ill. 149; Jackson v. Kinney, 385.) But notwithstanding our inability to search the record, our view of the law applicable to this case, makes the question concerning the admissibility of the proposed testimony of no materiality, because such evidence seems to relate only to the question of damages. Inasmuch as we have reached the conclusion that no damages can be assessed against appellee the testimony above referred to was irrelevant. The judgment in this case is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 26. General No. 7398

Charles W. Helmig,

appellant,

vs. Appeal from La Salle County

Frank L. Dean,

appellee,

237 I.A. 660

Jones, J.

The appellant, Charles W. Helmig, began suit in the Circuit Court of La Salle County, against the appellee Frank L. Dean, to recover a commission alleged to be due him for the sale of real estate. At the close of all the evidence on behalf of appellant, the court directed a verdict in favor of appellee. This is the only error assigned. The only question is whether there is any evidence in the record fairly tending to support the averments of plaintiff's declaration. (Libby, McNeill & Libby v. Cook, 222 Ill. 206.)

The evidence shows that the appellee, his sister Sarah Hauger and her husband, Frank Hauger, were the owners of a tract of land containing 152 acres. The appellant testified that he learned the land in question was for sale; that he then called Dean on the telephone and after two or three calls, succeeded in getting him to come to his office; that at that meeting Dean told him he was the man to whom he talked over the telephone; that appellant asked Dean if he had any agent representing him to sell the land; that Dean said he had not, and inquired of the appellant what his charge for selling was. Appellant told him $2.50 per acre. Appellant then asked Dean what price he wanted for his land and he said $282.50 provided that possession should not be given until a year from the following March. Thereupon Dean told the appellant that he was not the sole owner of the land and that his sister was downstairs in the car. Dean went down to see his sister and asked her to come up to appellant's office but she refused. When Dean returned, he told appellant that the price was

Agenda No. 26. General No. 7898

Charles W. Helmig,

appellant,

vs. Appeal from Lasalle County

Frank L. Dean,

appellee.

Jones, J.

The appellant, Charles W. Helmig, began suit in the Circuit Court of La Salle County, against the appellee Frank L. Dean, to recover a commission alleged to be due him for the sale of real estate. At the close of all the evidence on behalf of appellant, the court directed a verdict in favor of appellee. This is the only error assigned. The only question is whether there is any evidence in the record fairly tending to support the claims of plaintiff's declaration. (Libby, McNeill & Libby v. Cook, 222 Ill. 206.)

The evidence shows that the appellee, his sister Sarah Hanger and her husband, Frank Hanger, were the owners of a tract of land containing 182 acres. The appellant testified he learned the land in question was for sale; that he then called Dean on the telephone and after two or three calls, succeeded in getting him to come to [illegible] him he was the man to whom he talked over the telephone; that appellant asked Dean if he had [illegible] remembering [illegible] all the land; that Dean said he had not, [illegible] land what his charge for selling was. Appellant told him [illegible] per acre. Appellant then asked Dean what price he wanted for his land and he said $282.50 provided that possession should not be given until a year from the following March. Thereupon Dean told the appellant that he was not the sole owner of the [illegible] his sister was downstairs in the car. Dean went down to see his sister and asked her to come up to appellant's office but she refused. When Dean returned, he told appellant that the price was

$287.50, if possession were given the following March; that it must be a cash deal and the land sold subject to a mortgage on the place, with $1000 to be paid down at the time of signing the contract. These prices were to include the commission. Dean told the appellant that the farm contained 152 acres. The sale was to be made before January 6th. This is the only evidence in the record concerning any contract listing the land.

The appellant had talked with John Bruch previous to his conversation with the appellee and from him had learned that he might purchase the farm in question. Immediately after the appellee left appellant's office the appellant called Bruch on the 'phone and arranged to meet him and go to the Dean farm the next morning. This they did. After looking over the buildings and lands, a short time, appellant and Bruch went into the house, where they met Dean and Hauger. Appellant told Dean and Hauger that he had sold the farm to Bruch for $287.50 an acre. He asked for an abstract or deeds from which to draw a contract. Dean gave him his deed for the land. Upon examination of it, the appellant stated that it was not clear from the deed that there were more than 129 acres in the farm. Dean at once said that they would not sell for less than $287.50 an acre, the deed to call for 152 acres. Bruch refused to pay for more land than the farm actually contained but said he was willing to buy the farm at $287.50 an acre whether it contained 129 acres or 152 acres.

Dean claimed that he had caused a survey of the farm to be made by the county surveyor and that a plat could be found at Ottawa. He suggested that the parties go to Ottawa on the following Tuesday and close the deal by signing a contract. Dean's suggestion about meeting at Ottawa was agreed to by both Bruch and Helmig. On Monday, the day before the Tuesday which had been fixed as the time for meeting at Ottawa, Dean notified both Helmig and Bruch that the land was no longer for sale. Thereupon Helmig wrote a letter dated December 23rd, 1918, addressed to Dean, Mr. Hauger and Mrs. Hauger, in which he stated that Bruch had informed

$287.50, if possession were given the following March; that it must be a cash deal and the land sold subject to a mortgage on the place, with $1000 to be paid down at the time of signing the contract. These prices were to include the commission. Dean told the appellant that the farm contained 182 acres. [illegible] was to be made before January 6th. This is the only evidence in the record concerning any contract listing the land.

The appellant had talked with John Brush previous to his conversation with the appellee and from him had learned [illegible] might purchase the farm in question. Immediately at [illegible] last appellant's office the appellant called Brush on [illegible] and arranged to meet him and go to the Dean farm the next morning. This they did. After looking over the [illegible] time, appellant and Brush went into the house, where [illegible] and Hauger. Appellant told Dean and Hauger that [illegible] farm to Brush for $287.50 an acre. He asked for an [illegible] deeds from which to draw a contract. Dean gave him [illegible] the land. Upon examination of it, the appellant stated [illegible] was not clear from the deed that there are more than [illegible] in the farm. Dean at once said that they would not [illegible] than $287.50 an acre, the deed to call for 182 acres. Brush [illegible] fused to pay for more land than the farm actually contained but said he was willing to buy the farm [illegible] it contained 182 acres or 182 acre[illegible].

Dean claimed that he had caused a survey to be [illegible] made by the county surveyor and that a plat could be [illegible] He suggested that the parties go to Ottawa [illegible] the [illegible] Tuesday and close the deal by signing a contract. Dean [illegible] ion about meeting at Ottawa was agreed to by [illegible] On Monday, the day before the Tuesday which had been [illegible] the time for meeting at Ottawa, Dean notified both Brush and [illegible] that the land was no longer for sale. Thereupon Brush wrote [illegible] letter dated December 22, 1913, addressed to Mr. [illegible] and Mrs. Hauger, [illegible]

him that he was ready and willing to buy the place upon the terms proposed and that inasmuch as he, Helmig, had found a purchaser within the time fixed by the contract, the commission was due. Helmig never received a reply to this letter. Prior to the writing of the letter, both Helmig and Bruch had ascertained that the farm actually contained 152 acres, as contended for by Dean. Bruch testified that he was anxious to get the farm and was able, ready and willing to purchase it upon the terms proposed or to pay all cash if desired, and that he so told both Dean and Helmig.

Helmig and Bruch were the only witnesses who testified and we must view the case in the light of their testimony. We think there is ample evidence tending to prove that Dean employed appellant as a real estate broker to make a sale of the farm in question. If we credit the testimony as to what occurred at the farmhouse, when all the interested parties were present, and the testimony of the witnesses with reference to Dean's calling off the deal on Monday there can be little doubt about the existence of a contract.

It is urged by appellee that Dean was not the sole owner of the land and had no right to make a binding contract for a real estate commission. In our judgment it makes no difference whether or not Dean was the sole owner of the land, or whether or not he had authority from Mr. and Mrs. Hauger to bind them. His right to contract to pay a real estate commission is not based upon his ownership of land. He had a right to contract with the broker notwithstanding he was the owner of only an undivided interest in the land and lacked authority from his co-owners to sell. (Stone & Co. v. Deahl, 174 Ill. App. 421.) One who employs a broker to find a purchaser is usually liable for compensation regardless of the nature of his interest in the property and regardless of whether or not he has any interest in it whatsoever. (9 C.J. 586.)

According to the testimony offered on the trial appellant

him that he was ready and willing to buy the place upon the terms proposed and that inasmuch as he, Helmig, had found a purchaser within the time fixed by the contract, the commission was due. Helmig never received a reply to this letter. Prior to the writing of the letter, both Helmig and Brush had ascertained that the farm actually contained 182 acres, as contended for by Dean. Brush testified that he was anxious to get the farm and was able, ready and willing to purchase it upon the terms proposed or to pay all cash if desired, and that he so told both Dean and Helmig.

Helmig and Brush were the only witnesses who testified and we must view the case in the light of their testimony. In this there is ample evidence tending to prove that Dean employed Samelant as a real estate broker to make a sale of the farm in question. We credit the testimony as to what occurred at the farmhouse, when all the interested parties were present, and the testimony of the witnesses with reference to Dean's calling off the deal on Monday there can be little doubt about the existence of a contract.

It is urged by appellee that Dean was not the sole owner of the land and had no right to make a binding contract for a real estate commission. In our judgment it makes no difference whether or not Dean was the sole owner of the land, or whether he had not authority from Mr. and Mrs. Hagger to bind them. He had right to contract to pay a real estate commission in not [illegible] his ownership of land. He had a right to contract [illegible] the broker notwithstanding he was the owner of only an [illegible] interest in the land and lacked authority from his co-owners to sell. (Stone & Co. v. Beebe, 174 Ill. App. [illegible] to procure a broker to find a purchaser is usually liable to commission regardless of the nature or his interest [illegible] year and [illegible] or in it whatsoever.

(9 C... ...88.)

According [illegible] trial appeal at

was given two weeks' time in which to find a purchaser and it is contended that because Dean terminated the contract before the expiration of that time and before Bruch had consented to buy the farm, with the understanding that it contained 152 acres, there can be no liability for commissions. This is an erroneous contention. Where a real estate owner has given a broker a fixed period of time in which to find a purchaser, he cannot terminate the contract before its expiration without liability. This court, in Harrison v. Augerson, 115 Ill. App. 226, held that both reason and justice will prevent an escape from liability under such circumstances. (Meecham on Agency, Sec. 210). In this case the evidence tends to show that appellant produced a purchaser within the time limited, who was ready, able and willing to buy on the terms and conditions proposed by Dean. If such is the case it would be gross injustice to deprive him of his commission.

The judgment in this case was entered pursuant to a motion of the appellee for a directed verdict at the close of all of appellant's evidence, therefore, we have treated the testimony in its most favorable light, but we do not intend to express any view as to what weight or credit should be given to it when the case is tried again. We are convinced that there was sufficient evidence in the case to necessitate the submission of it to a jury and that the trial court was in error in directing a verdict. The cause is therefore reversed and remanded. We are of the opinion that a demurrer was properly sustained to the plea of estoppel by verdict.

Reversed and Remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

Clerk of the Appellate Court.

General No. 7778 Agenda No. 13

October Term, A. D. 1924

Willis McGrew, Defendant in Error,

vs.

William W. Wheelock and William G. Bierd, Receivers, Chicago & Alton Railroad Co., Plaintiffs in Error.

237 I.A. 661

Error to Circuit Court of Sangamon County

SHURTLEFF, P. J.

This suit was brought by defendant in error to recover damages for injuries suffered by defendant in error, who was driving a truck carrying a load of corn, caused by a collision between said truck and a train upon plaintiff's in error railroad, at an east and west road crossing, over the tracks of said railroad, in the unincorporated village of Sherman, in Sangamon County, on the 22d day of February, A. D. 1923. Defendant in error was injured and his truck was demolished.

The declaration, in two counts, charged general negligence and that no bell was rung or whistle sounded by the servants of said railroad for said road crossing. Plaintiffs in error filed the general issue. There was a trial by jury and verdict and judgment for defendant in error and the record is brought to this court by writ of error for review.

The facts in the case shown by the testimony are substantially as follows: The railroad runs through the village of Sherman, north and south, bearing a little to the northeast and southwest. The station at Sherman is two or three blocks north of the highway in question, and near the station the railroad curves to the northeast. South of the highway for a short distance, the railroad comes through a cut, with embankments, which are four or five feet above the rails. The "Burlington" highway, upon which defendant was driving and approaching the railroad from the east, runs east and west and when from one hundred to one hundred fifty feet east of the railroad, it curves bearing northwesterly until it comes to the right of way of the railroad and then turns due west and proceeds west over the tracks of the railroad. The highway, as it approaches to the railroad, is slightly up grade and the railroad from a mile south of the highway is on an up grade. At the time of the accident, at the fence line on the south line of the highway, there were some shrubs or trees east of the railroad, which proceeded in a straight line from the road running due west, and did not follow the curve to the right of way of the railroad. These trees or shrubs were

eight to ten feet in height, but in no manner obstructed the view on the right of way. Looking south from the crossing at a distance of twenty, to twenty-five feet east of the east rail of the railroad, and again two hundred feet east from the railroad tracks, there were openings in the shrubbery or trees, the easterly one for a distance of forty feet, which afforded a clear view to the southward along plaintiffs in error's right of way for several hundred yards. On the east side of the right of way of the railroad and a few feet from the east rail, there was the regular railroad crossing sign and facing east, in full view for one hundred to one hundred fifty feet on the highway, there was a "stop" sign, placed there by the railroad company, under orders of the Public Utilities Commission, now known as the Illinois Commerce Commission of the State of Illinois, in pursuance of paragraph 77, page 2698 and paragraph 161, page 2576, Ill. Rev. Statutes, 1923, (Cahill's).

Plaintiff's in error regular limited passenger train, consisting of engine, tender and from ten to twelve coaches, seventy-five feet in length, left Springfield, eight miles south of Sherman, at 2:55 p. m. on the day in question, on time. It was due at Sherman at 3:08 p. m., where it made no stop and the testimony substantially shows that the train arrived at Sherman on time. About a mile south of Sherman the train was running at a rate of fifty miles per hour, but when it arrived at the station whistling post, about eighty rods south of the highway, it had slowed down to forty miles per hour and was then reducing speed on account of the curve near the station. The testimony shows that the speed of the train, at the crossing where the accident occurred, was substantially twenty-five miles per hour. Defendant in error proceeded over the "Burlington" highway, driving his truck at a speed from ten to fifteen miles per hour. He had driven over this crossing daily from four to five times per day for about two years. He knew the time and method of running this limited train, and knew that it was due to pass Sherman, going north at 3:08 in the afternoon. Defendant knew of the "stop" sign and had seen it on the right of way in direct view of the road, near the crossing, many times. Defendant in error testifies that when two hundred to two hundred fifty feet east of the crossing, at the break in the "hedge" or "shrubbery" he looked to the south and looked to the north but saw no train approaching. He testifies that he again looked to the north but did not look to the south until he got past the shrubbery, and when within twenty feet from the tracks he looked to the south, when his truck was within four or

five feet from the rail, and the train was right upon him. Defendant in error testifies that he maintained his speed at not less than ten miles per hour until within a few feet from the tracks, when it was slacked up some to go over the crossing. Defendant in error was riding in an inclosed cab at the front of the truck, but the doors and sides were of glass, so that there was a clear vision on either side to the occupant of the cab. The train struck the truck and threw it back to the eastward of the rails. The engineer of the train testified that he saw the truck approaching soon after he passed the eighty rod post, and that the truck, which he assumed would stop, was within his view constantly, until the accident occurred; that as the truck approached the track of plaintiffs in error, it slowed down to four or five miles per hour, and then started up again to go across the tracks, upon which he applied his emergency brakes.

Some of the witnesses for defendant in error testified that they heard no bell rung or whistle sounded, except the warning blasts of the whistle a few hundred feet south of the crossing and up to the crossing. On the other hand, there is the positive testimony of the engineer and fireman that the bell had been automatically ringing the entire distance from Springfield and that the station whistle and crossing whistle were sounded at the proper stations, and several witnesses, not interested and not employees of the railroad, testified positively that they heard the station whistle and the crossing whistle blown before they heard the danger whistle.

There was further testimony from actual measurements that the "stop" sign was twenty feet east from the east rail of the railroad, and that the east line of the right of way of the railroad was thirty feet east of said rail and from actual views taken—both by the testimony of witnesses and photographs—it was shown that at the time of the accident for a space of forty feet in width east of the east rail of the track, there was a clear view south on the right of way, and a train could be seen for a distance of one-fourth of a mile.

Defendant in error testified that he could have stopped the truck within a distance of twenty feet. Several of the witnesses for defendant in error testified to hearing the roar of the train before it came in sight.

At the close of all the evidence, plaintiffs in error submitted an instruction and moved the Court to instruct the jury to find a verdict for the defendants. The Court refused to give the instruction and it is assigned as error.

The evidence of negligence on the part of plaintiffs in error is slight, if not imperceptible. The speed of the train, by all of the testimony, at the crossing in question did not exceed twenty-five miles per hour, and from all the surrounding circumstances, if this rate of speed should be held to be hazardous, dangerous or negligent, or to endanger public traffic over this crossing, it would render the operation of limited trains unlawful and impractical. **Partlow v. I. C. R. Co.** 150 Ill. 321; **Passwaters v. L. E. & W. R. Co.** 181 Ill. App. 47. There was no evidence fairly tending to prove common law negligence in the management of the train.

"It has been repeatedly held that although an engineer or fireman may see a traveler approaching a crossing, he may lawfully assume that such traveler will stop before he reaches a place of danger, until the contrary appears." **Storm v. C. C. C. & St. L.,** 156 Ill. App. 88; **loc. cit.** 93; **C. B. & Q. v. Florens,** 32 Ill. App. 365; **W. St. L. & P. v. Krugh,** 13 Ill. App. 431.

Defendant in error can only ground negligence in this case upon the second count of the declaration, for failure to ring the bell or sound a whistle at the crossing post, and while some of the witnesses testify that they heard no bell or whistle, nevertheless, the rule is, that the presence of an automatic bell in good working order, which is positively testified to as ringing, is often a decisive factor on that question. **C. B. & Q. v. Sack,** 136 Ill. App. 425; **C. R. I. & P. v. Jones,** 135 Ill. App. 380; **Wabash v. Kamradt,** 109 Ill. App. 203; **C. B. & Q. v. Thorsen,** 68 Ill. App. 288.

And it has been held that the testimony of those whose duty it was to give the warning who knew that their own lives and the lives of others depended in some measure on whether they performed their duty, and whose attention would be especially called to the fact of whether they had performed it by the disaster which followed only a few seconds after the warning ought to have been given, was certainly more to be relied on than that of those who had no duty to perform in the matter, whose senses were not alert to hear, and who had no special reason to hear the whistle. **Corcoran v. Pa. R. Co.,** 53 Atl. 240; **Cline v. C. M. & St. P. R. Co.,** 198 Ill. App. 163.

It is not the duty of the court to weigh conflicting evidence. The Court, however, has the duty of determining "whether there is or is not any evidence legally tending to prove the fact affirmed, evidence from which, if believed, and not considering any controverting evidence, it might

reasonably be inferred the fact existed." **Mirich v. Forschner Cont. Co.,** 312 Ill. 346.

Whatever may be the condition of this record as to the negligence on the part of plaintiffs in error, there is no evidence legally tending to prove that defendant in error was in the exercise of any care or caution on his own behalf. On the other hand, the evidence shows that defendant in error was guilty of gross negligence, which not only contributed to but caused his injury. If he had obeyed the "stop" sign, defendant in error would not have been struck by the train. Defendant in error is presumed to know the law which provided:

"Failure to bring such vehicle to a full stop at such a crossing, before passing over the tracks of the railroad, as herein provided, shall be deemed a misdemeanor and the person guilty of such misdemeanor shall be subject to a fine not to exceed ten dollars." (Rev. Stat. of Ill., (Cahill) page 2976, par. 161—1923). This Act was passed for the protection not only of those using the road but of railroad companies. Defendant in error, in fact, knew of the sign and had seen it four or five times daily, and to hold that the violation of this act knowingly, when it is the proximate cause of the injury, does not impute contributory negligence to the driver, is merely to place a premium upon law violation. **Burns v. C. & A. R. R. Co.,** 229 Ill. App. 170; **Johanna Frese, Admx. v. C. B. & Q. R. Co.** 290 Mo. 501; S. C. 235, S. W. 97; S. C., U. S. 68 Law Ed. 1.

The railroad company is entitled to the protection of this law, whether defendant in error chooses to abide by it or not, and the railroad company had a right to rely upon defendant in error complying with the law.

Defendant in error testified that for twenty feet east of the railroad tracks a person could see south on the right of way and see a train a quarter of a mile away, but that, at that time, he did not look south until the train was right upon him,—he looked up and saw the train.

"Without evidence of conditions or circumstances which excuse looking where looking would disclose the danger, a jury is not warranted in finding that such failure to look is not negligence." **Binder v. C. C. Ry. Co.,** 175 Ill. App. 503; **Burns v. C. & A. R. R. Co.,** 229 Ill. App. 170; **Koehler v. C. C. Ry. Co.,** 166 Ill. App. 571; **Burke v. C. C. Ry. Co.,** 153 Ill. App. 388; **Von Holland v. C. C. Ry. Co.,** 148 Ill. App. 320.

Defendant in error in this case insists that the case was fairly presented to the jury and that the jury was thoroughly and profusely instructed as to the "stop" sign

and therefore the judgment should be affirmed. The Court gave three instructions covering the "stop" sign and recited the act fully and instructed the jury that one who is injured in consequence of his own violation of law, or to whose injury his own violation of the law has contributed, cannot recover for such injury from another person or corporation, even though that other person or corporation has been guilty of negligence or of a violation of law, which also contributed to or helped cause the injury.

All of the instructions as to the "stop" sign stated the law correctly, and advised the jury if the "stop" sign had been erected by order of the Public Utilities Commission or the Commerce Commission, and was properly erected at the crossing, where it was in plain view, and defendant in error did not stop his vehicle and that his failure to stop contributed to cause his injury, defendant in error could not recover; but the jury, regardless of the evidence in this case and the instructions given, found a verdict in favor of the defendant in error. The Court below should have instructed the jury to find a verdict for plaintiffs in error. There is no testimony in the case ~~tending~~ to show that defendant in error exercised any care or caution in his own behalf; on the contrary it conclusively appears that appellee's failure to stop at the "stop sign" was the proximate cause of the injury. ~~and it is the duty of this Court to correct the error by reversing the judgment of the lower court, with a finding of facts.~~

Accordingly, the judgment of the Circuit Court of Sangamon County is reversed.

Reversed.

Finding of fact to be incorporated in the judgment:

We find that the plaintiff below, Willis McGrew, was guilty of contributory negligence in failing to heed the "stop sign" and stop his car twenty feet from the railroad crossing in question, which was the proximate cause of the injury.

General No. 7762 Agenda No. 52

October Term, A. D. 1924

237 I.A. 661

Carl H. Elshoff, Appellant,

v.

Thomas F. Murray, Mildred Spacek, and Murray Coal and Coke Company, Appellees.

Appeal from the Circuit Court of Sangamon County.

SHURTLEFF, P. J.

This case, in another form, was before this court in General number 7766, October Term, A. D. 1924, on a petition for certiorari, brought by appellees on this appeal upon which a writ was issued and further proceedings in the court below, certified to this court, upon a consideration of which it was held and determined that there was no final order or decree in said cause in the Circuit Court of Sangamon County, and for that reason the writ was quashed. For a statement of the case and the reasons upon which that opinion is based, reference is hereby made to the opinion filed in that branch of this case. It follows, there being no final order or decree in this case in the court below, that the appeal in this case should be dismissed.

Appeal Dismissed (page 1).

General No. 7790. Agenda No. 25.

October Term, A. D. 1924

R. J. Steven, Appellee,
v.
The Combination Fountain Company, a Corporation,
Appellant.

237 I.A. 661

Appeal from the Circuit Court of Macon County.

SHURTLEFF, P. J.

This case was before this court at its April Term, A. D. 1923, on a judgment for appellee, and reversed and remanded for the giving of an erroneous instruction in behalf of appellee. The case has been retried and upon a verdict and judgment for appellee, appellant again appeals to this court for a review of the record. We adopt the statement of the case and what was then said upon two issues now raised on this appeal, from the former opinion:

"This is an appeal from a judgment of the Circuit Court of Macon County for the sum of $4418.55 and costs, in favor of the appellee, plaintiff, and against the appellant, defendant, in an action of deceit based upon the allegations of the amended third count of appellee's declaration, which in substance alleged that appellant made certain false representations to appellee as to its profits for the year ending June 30, 1920, its assets of July 1, 1920, its liabilities, net worth and notes and accounts receivable; that it was in need of ready money and had no shares of its stock for sale; that it needed such money for a short time until, to wit, January, 1921; that if appellee would execute his note to the company for five thousand dollars and sign a stock subscription agreement appellant would raise money on the note and stock sub- (page 1)
scription agreement and have sufficient funds to pay off any loans secured on such note before its maturity, and if appellee so elected appellant would return the note and stock subscription agreement to appellee and save him harmless thereon; that relying upon such representations appellee did execute his note for five thousand dollars and signed the stock subscription agreement for fifty shares of the capital stock of the company set forth in the additional count; that before maturity of the note appellant sold it and made a pretended tender to appellee of the stock mentioned in the agreement; that appellee refused to accept the stock and demanded the return of his note, but that the appellant had sold the note and appellee was compelled to pay it in the hands of an innocent purchaser for value; that the representations made by appellant to appellee concerning its

financial condition were false; that appellant did not expect nor intend to return the said note and subscription agreement upon his demand to save him harmless on account thereof; and that such representations were made by appellant falsely and fraudulently with the intent that the appellee should rely thereon and that appellee did rely thereon and was damaged.

It is contended by appellant that appellee cannot recover in this form of action—deceit, for the reason that the proximate cause of his damage, if any, was not deceit practiced upon him, but was a breach of contract by defendant to pay and return his note and save him harmless thereon, and that such damages cannot be recovered in an action for deceit.

In **Luttrell v. Wyatt,** 305 Ill. 274, it was said: "It is true that in order to constitute a fraud in law the representation must be an affirmance of fact, and not a mere promise or expression of opinion or intention. A promise to perform an act, though ac- (page 2)
companied at the time with an intention not to perform it is not such a representation as can be made the ground for an action of deceit."

In the present case, however, appellee did not base its claim on the breach of contract, but on the injury caused appellee by the alleged falsity of the representations as to past and existing facts by reason of which appellee was induced to execute the note and stock subscription in question. We are of the opinion that under the circumstances in evidence, if the evidence in behalf of appellee be taken as true, the action brought by appellee was a proper one.

The court admitted parol evidence to prove that what purported to be a written purchase of stock and a note given in payment therefor was not a purchase at all, and appellant contends that this evidence varied and contradicted the terms of a written instrument. This evidence was competent, not for the purpose of varying or contradicting the terms of a written contract, but for the purpose of showing that what purported to be a written contract had in fact never been executed and delivered as a valid, legal, binding contract.

In **Bell v. McDonald,** 308 Ill., it was said: "It is argued on behalf of the appellant that the statement in the pleas that the instruments were delivered only as collateral security for the stock powder to be sold and were to be held by the payee and surrendered when the amount for which the stock powder was sold was collected by the payee is only an attempt to change and qualify the unconditional written promises by a contemporaneous parol agreement, in violation of the general rule that an instrument absolute on its face cannot be shown by parol to be conditional. While

this is a recognized rule of general application, yet evidence that the instrument was not intended to take effect as a valid obligation (page 3)
until the occurrence of some future contingency is usually held admissible between the original parties and between them and those taking with notice. Such evidence, it is held, does not contradict the terms of the writing or vary its legal import, but tends to show that it was never delivered as a present contract. The possession of a contract unexplained may be presumptive evidence of its delivery, and under such circumstances no alteration of the terms of the contract could be shown, but until the delivery the writing is inoperative, and the delivery upon condition does not make it operative until the condition has been complied with. Evidence of such conditional delivery does not alter or vary the contract.

In **Kilcoin v. Ortell,** 302 Ill. 531, it was held that a written contract, though signed, may fail to become binding for want of delivery, and while possession of such a contract by the party seeking to enforce it is presumptive evidence of delivery, such evidence is not conclusive, but testimony as to the circumstances attending the transaction is competent on the question whether the contract was completed and delivered with the intention that it should become presently binding."

It may be added that the law is well settled that parol evidence is competent to vary a written contract where fraud and deceit are involved and the action is not upon the contract. **Antle & Bro. v. Sexton,** 137 Ill. 414; **Grubb v. Milan,** 249 Ill. 464.

Appellant's main contention in this case is, that there was no testimony before the jury showing that the statements and representations made to appellee, on or about the 30th day of September, A. D. 1920, when the note and subscription were signed, were false and untrue, and that all of the documents, books and contracts submitted to the jury were in relation to the values of property (page 4)
and situation of the corporation affairs, long after July 1, 1920, and had no relation to the condition of affairs as of the time to which the statements and charges of misrepresentation refer, and that the jury should have been instructed to find a verdict for defendant.

It was represented to appellee that the company earned dividends for the year ending June 30, 1920, of over ninety-nine thousand dollars, and that it had notes receivable of $230,655.63 and accounts receivable of $301,614.46, trade acceptances of $876.34 and cash in bank of $62,889.16, in addition to a factory of the value of $210,310.11; and of its liabilities appellee was informed that it had notes current $98,500, notes payable, due in five years, $215,000, accounts

payable, $99,042.98, reserve for commissions $81,592.16 and some other small matters. Specifically, appellee was not informed of the contract entered into on the 28th day of August, A. D. 1919, between F. P. Howard, president of the corporation, and his associates, holding $189,700 par value of said stock and being a majority of the stock, as party of the first part, and the said corporation as party of the second part, and C. H. Beane, later president, as a third party, by which the Howards sold all of their stock to the corporation and certain contracts which the Howards held for stock they had sold to some of the minority stockholders. The terms of this agreement were that the third party was to pay the Howards ten thousand dollars cash in hand, and $54,546.75 within sixty days from date, and in addition the second party, appellant corporation, within the sixty days was to execute and deliver its notes, dated July 1, 1919, for the aggregate sum of two hundred seventy-five thousand dollars, bearing interest at the rate of six and one-half per cent per annum, interest payable semi-annually, payable to the order of said F. P. (page 5)
Howard for the benefit of said vendors, said indebtedness to be evidenced by fifty-five notes each for the principal sum of five thousand dollars and to become due, one each month, commencing ninety days from date. As security for said notes, the appellant corporation agreed to deposit with the National Bank of Decatur, in escrow, as collateral, the regular notes and mortgages not due, which said corporation had received from the sale of its production, which should be maintained for a period of two years at the ratio of one hundred dollars of collateral, not past due to one hundred dollars of such note indebtedness; after two years from the date of the contract, the ratio should be one hundred twenty-five dollars of collateral not due, for each one hundred dollars of such note indebtedness. All collateral notes and mortgages were to be properly assigned and guaranteed by said corporation. Permission was given in this contract to withdraw maturing collateral by the substitution of other like paper in its place. It was further provided that upon failure of said corporation to pay any note when due, or to keep the full amount of the collateral intact, the whole of said indebtedness should become due, and time was made the essence of the contract and the first party was to retain, in case of default, any payments made as liquidated damages.

Conceding this to be a legal contract made by the corporation, although it is not shown to have been made with the consent of its stockholders, as a financing proposition, it seems inconceivable that a minority of the stockholders should create a liability of two hundred seventy-five thousand dollars and in addition pledge the bulk of its liquid

assets to secure that liability, for the purpose of purchasing, **not an asset** but additional liabilities. (page 6)

It was represented to appellee that this money was needed to meet the growing requirements of the corporation's expanding businss. The undisputed testimony in this record is that this statement was a misrepresentation. Rogers had a talk with Beane in Shellabarger's garage about September 15, 1920. Rogers had talked with Howard before that time. At the garage Beane told Rogers that Howard would not grant any extensions to the company for the money due him, and that the company would have to make a substantial payment or Howard might foreclose on the notes he held. Beane asked Rogers if there was a possibility of borrowing money with which the company could pay Howard and later repay the loan. Beane was the new president of the company after the Howard stock had been purchased. F. P. Howard had signed the contract as the president of the company on August 28, 1919, to which contract he was also a party. The conclusion to be drawn from this whole record is, that after the Howard stock interest was purchased in August, 1919, by the corporation, the corporation as a financial institution was strangling to its death. Early in July, 1920, Rogers was called in and employed to sell one hundred thousand dollars in stock upon a twenty per cent commission, and before appellee signed the note and subscription upon September 30, 1920, the plan of selling stock was changed to a programme of borrowing money indirectly, by soliciting optional subscriptions of stock, with the guarantee to pay the notes and save the makers harmless, if they so desired. The whole situation in the summer and fall of 1920 developed into a "mad rush" to sell stock or borrow money to meet the payments on the Howard notes. Notes receivable and accounts receivable that were of any value and belonging to the corporation, were hypothecated with Howard as collateral security, under the contract, and while they were listed as assets of the corporation the corporation did not own them at all. In July, August and September, 1920, it is plain that the appellant corporation was (page 7)

insolvent and not able to pay the Howard debt. This is conclusively shown by the figures made in the settlement agreement by appellant corporation with the Howard interests on February 21, 1921, wherein it is shown that not over thirty-seven thousand dollars had been paid upon the principal of the Howard notes (which would make the last payment not later than May 1, 1920), at which time, under a contract, the Howard interests resumed the majority control of said corporation. On the judgment and execution against appellee upon the note, the certificate for five thousand dollars in stock was bid in by F. P. Howard for one

thousand dollars, and thereafter appellee paid the balance of the judgment, $4322.51, by check to F. P. Howard. These matters occurred after the dates to which the representations refer, but they are evidentiary facts tending to show that a minority group of the stockholders in the summer of 1920 were operating a "stock jobbing" deal, to secure control of the Howard interests in said corporation, and were not soliciting appellee for funds to take care of the legitimate and increasing business of the company. The figures that these men in control put upon paper are of small moment. The real question is what did they have and what did they do, and in this respect fragments are enlightening.

Subsequent to the purchase of the Howard stock and to make up a statement for the Secretary of State to cover the Securities Act, there was a pretended sale by the appellant company of two hundred fifty thousand dollars of the Howard stock to Beane, and Beane gave his note to appellant as an asset. Beane was shown to have no property except a very moderate house and lot in Decatur, and the stock so pretended to be sold still remained in Howard's hands and could only be obtained by paying Howard (page 8) eighty dollars in cash upon each share of stock released, to which end appellee apparently served a useful purpose. At one time a general account, growing out of losses, deficiencies and misplacements, as near as we can gather from the entire record, was carried against Beane to the amount of $339,595.69, but upon the settlement with the Howard interests in February, 1921, this account was balanced off without a murmur. To go into all of the ramifications of this corporation during the interim that the Howards were not in control would extend this opinion to too great length and serve no useful purpose. In the opinion of this court the record does show that in the summer of 1920 appellant was insolvent (**Best v. Fuller & Fuller Co.**, 185 Ill. 48), and that the proofs submitted warranted the court in submitting the cause to the jury.

Some complaint is made by appellant that in none of the instructions given is the specific fraud and deceit charged in the declaration set forth and read to the jury, and in appellee's second instruction the jury are told: "That a party alleging fraud must prove it," etc., without informing the jury of what the fraud consisted, to which exception is taken. It is the right of either party, by proper instructions, to request the court to correctly advise the jury as to the specific issue, but when this has not been done by either party we must conclude that the issue has been fairly stated to the jury and that such omission is not reversible error.

Appellant assigns error upon the court's refusal to give appellant's second instruction, advising the jury that an actionable representation must relate to past or existing

facts and cannot consist of mere broken promises, etc. The same matter was covered in appellant's eleventh instruction given. (page 9)

Finding no errors of law upon this record, and the testimony submitted supporting the verdict, the judgment of the circuit Court of Macon County is affirmed.

Affirmed. (page 10)

General No. 7811 Agenda No. 40

October Term, A. D. 1924.

237 I.A. 661

Easton Farmers Grain Company, a Corporation, Appellant.

v.

Fernandes Grain Company, a Corporation, Appellee.

Appeal from the Circuit Court, Sangamon County.

SHURTLEFF, P. J.

This case was before this court at its October Term, A. D. 1922, at which time a judgment on a verdict instructed by the lower court, in favor of the defendant, appellee, was reversed and the cause remanded to the Circuit Court of Sangamon County, with directions that the testimony should be submitted to a jury. For a full statement of the case see **Easton Farmers Grain Co. v. Fernandes Grain Co.**, 229 Ill. App. 102. The cause has been retried and there is a verdict and judgment for defendant, appellee, from which appellant appeals.

There are numerous assignments of error. The declaration and bill of particulars were in assumpsit for money had and received, growing out of the provisions of sec. 310, chap. 38, Cahill's Stat. 1923.

Appellant offered a new witness at the last trial, by whom it proposed to show that he had heard Ray Fernandes, manager of appellee's Lincoln office, place orders for the purchase of grain for future delivery through the Board of Trade, but which grain had not been ordered by any customer; and that, if the market advanced Fernandes would get the benefit of the trade, but that if the market went down he would call up appellant's manager and (page 1) falsely tell him the market was rising and advise him to buy at the price Fernandes had purchased earlier in the day, and that in such transactions appellant had no chance except to lose. It was objected that such testimony was not competent under the pleadings. The court sustained the objection and it is assigned as error. Appellant contends that the offered testimony was competent and was a circumstance to be taken into consideration by the jury in determining whether it was the intention of both parties not to deliver any grain. Appellee contends that the declaration and bill of particulars expressly charged the mutual intent of the parties to gamble; that is, the pleadings charged the purchase and sale of grain, at stated prices, with the mutual understanding that there would be no delivery in any event, but that the transactions would be closed out only by the payment of market differences. In other words, the pleadings charged an actual agreement as to an intent, a meeting

of the minds upon a gambling enterprise. It cannot be said that the offered testimony would add anything to or take anything away from appellant's losses or gains set out in the bill of particulars, as such items were agreed to by both parties, and in any event remained the same. The only effect such testimony could have upon appellant's amount of gains or losses would be to lessen the amount of loss upon the gambling contract and show a loss of a portion of the amount charged by fraud and deceit, not set out in the declaration or bill of particulars. However, we are not able to perceive how the testimony, if true, would shed any light upon the inquiry as to whether these parties, or either of them, intended to deliver the grain sold or settle upon margins. For the purpose of this suit, on the pleadings, it would be as competent to show that one who would lie, cheat or steal, would gamble, and produce testimony as to (page 2)
appellee's moral deficiencies in other lines, and therefore argue that appellee intended to violate section 310, **supra,** of the Criminal Code. We think there was no error in sustaining appellee's objection to this offered proof.

Upon the sustaining of objections to the proffered testimony, appellant moved the court for leave to amend its declaration and bill of particulars. A form of amendment was not submitted to the court and appellant's motion to amend was denied. This is assigned as error. It has been held that it is not error to refuse to allow an amendment which is not presented in written form. **McFarland v. Claypool,** 128 Ill. 403; **Dilcher v. Schorik,** 207 Ill. 530. Any proposed amendment to the declaration, under which the proffered testimony could have been submitted, should have charged fraud and deceit, which would have been an action not in assumpsit, but trespass on the case (Perry on Pleading, p. 80). Counts in case cannot be joined in the same pleading with counts in assumpsit. Chitty on Pleading (12th Am. Ed.) Vol. 1, p. 201; Puterbaugh's Com. Law Pl. (9th Ed.) 902, 906, 27 Corpus Juris, 18. If appellant has sustained injury and damages on account of fraud and deceit of appellee's agent, it has a remedy by a separate proceeding at any time within the five year period of limitation (Par. 16, chap. 83, Cahill's Ill. Stat. 1923). There was no error in the court's ruling, not permitting appellant to amend.

Appellant objected to the competency of certain depositions read to the jury by appellee, tending to show that orders 68 to 101 were in fact executed through Lamson Bros. & Co. on the Chicago Board of Trade, and appellant cites **Zimmerman v. McCreery** (abstracted) 230 Ill. App. 673, decided by this court, as authority for the incompetency of this evidence. The authority is not in point. In **Zimmerman v. McCreery, supra,** one of the parties sought to

prove (page 3)
the intention of brokers on the Board of Trade, not in any manner connected with the suit, and it was held that the intention of third parties in reference to grain deals and trades, even if shown by competent evidence, would not tend to prove or disprove what the arrangement or understanding was between the parties to the suit. It was further held as to the testimony offered in that case, that it was the mere opinion or conclusion of the witnesses as to what disinterested parties would have done in a situation which never presented itself.

Appellant complains of instruction No. 5, given for appellee, which informed the jury if they "believed from the evidence that plaintiff gave certain orders to be executed on the Board of Trade, that such grain was in fact purchased on the Board of Trade, but sold by plaintiff before delivery date, and losses sustained thereon, such losses would not in law be a winning in a gambling transaction," etc. The only objection to this instruction is that it makes prominent the Board of Trade and singles out portions of the testimony, etc. The answer to this objection is that appellant offered in evidence statements of account, rendered by appellee to appellant, on which it was shown that: "All purchases and sales made by us for you are made in accordance with, and subject to, the rules, regulations and customs of the Board of Trade of the City of Chicago, and the rules, regulations and requirements of its Board of Directors and all amendments that may be made thereto." In view of the testimony submitted, we do not think the giving of this instruction was error.

Appellant assigns error on the ground that it was unduly restricted in its cross examination of the witness Ray Fernandes, offered by appellee. Appellant, as a part of its main case, offered no testimony as to the nature, number or avocation of appellee's (page 4)
customers. Appellee offered the witness Ray Fernandes in defense, and one question and answer by the witness was as follows:

Q. "In general, in the buying and selling of grain, who were your clients and customers?

A. Various country elevators surrounding the Lincoln territory."

On cross examination appellant was permitted to show, by the witness, that he knew Arthur Lick, an agent of the Franklin Life Insurance Company, and had transacted business with him, and the witness had answered that others who came in and sat around had made trades in the office. Appellant on further cross examination of the witness, inquired if the witness ever had any transactions with Arthur Lick in futures, and if Arthur Lick had no grain nor any

occasion for grain so far as the witness knew. Both of these questions were objected to and the objections sustained. From reading the record, it is not shown that appellant was restricted in its inquiries as to the customers of appellee or with whom it transacted business, but on the inquiry as to the details of the transactions with individuals and with Arthur Lick, there were objections which were sustained by the court. The only foundation for this cross-examination was the question and answer heretofore set out. There is no doubt but that it was competent for appellant to show acts of the same nature, committed by appellee, at or about the same time when the same motive may be reasonably supposed to exist, with a view to establishing the intent of the parties, with reference to deliveries. **First Nat. Bank v. Miller,** 235 Ill. 140; **Gardner v. Meeker,** 169 Ill. 41; **Staninger v. Tobor,** 103 Ill. App. 333; **Livingston Nat. Bank v. Miller,** 154 Ill. App. 106. But appellant should establish such facts by its own witnesses or within the proper limits of cross examination of the witnesses for appellee. The cross examination of a witness must (page 5) be limited to the scope of the direct examination. **Schmidt v. Chicago City Railway Co.,** 239 Ill. 499, and cases there cited. We are of the opinion, in view of the direct testimony given by the witness, that the cross examination proposed was improper and that the court did not err in its rulings.

Appellant contends further that the verdict and judgment are against the manifest weight of the evidence, and should, therefore, be reversed. There was testimony introduced by appellee directly stating the intention of appellee in these transactions, which, if the jury believed it true, would support a verdict and judgment for appellee. Without going into the law governing the Chicago Board of Trade, which has been amply elucidated in numerous decided cases, many of which are cited and copiously quoted from by counsel for the respective parties in this case, it is sufficient to say that appellant does not contend that all purchases or sales for future deliveries are illegal, or that all transactions in futures on the Board of Trade are gambling transactions; but appellant does contend that the forms of legitimate trading on this Board may be used to effect gambling transactions and that this is what was done in this case. It has been held, to render a contract for the purchase or sale of grain for future delivery invalid and illegal as a gambling contract, it must affirmatively appear that at the time of the making of the contract neither party had the intention to deliver the property, but that both parties thereto had the intention to settle the same by the payment of market differences only, (Pelouze v. Slaughter, 241 Ill. 227) and that the intent of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit

of his contract, no matter what may have been the secret purpose or intent of the other party. **Pixley** (page 6) **v. Boynton,** 79 Ill. 354.

It has further been held that the fact that a contract for the purchase or sale of grain for future delivery is not followed by an actual delivery, according to the terms of the contract, but that the same is closed out prior to the delivery day, does not show a gambling contract. **Cutler v Pardridge,** 182 Ill. App. 355; **Ware v. Jordan,** 25 Ill. App 536, and 27 Corpus Juris, 1064. The fact that a majority of the transactions on the Chicago Board of Trade are settled by the method known as "ringing off" or "set off" has no tendency to indicate that such transactions are invalid, as that method of settlement has all the effect of an actual physical delivery. **Board of Trade v. Christie,** 198 U. S. 246 (49 Law Ed. 1037). It was held in an early case that the buying and selling of grain or other commodities for future delivery is in no way illegal, either at common law or under the statute; (**Pixley v. Boynton,** 79 Ill. 353) and that it makes no difference as to the legality of the contract whether the party who sells for future delivery at the time the sale is made, then has the grain on hand or not. **Logan v. Musick and Brown,** 81 Ill. 419.

Under the issues submitted in this cause, it is peculiarly the province of the jury to determine the question of fact which involves the intent of both parties, and it is needless to reiterate what was said upon that subject in the former opinion of this court in this cause. A reviewing court will not reverse a finding of a trial court upon disputed questions of fact, unless the finding is clearly and manifestly contrary to the weight of the evidence. We are of the opinion that there were no errors of law transpiring upon the trial of this cause that would warrant a reversal; and we are not prepared to say, from an examination of the entire record, that the verdict and judgment are manifestly against the weight of the evidence, and it follows that the judgment of the Circuit Court of Sangamon County should be affirmed.

Affirmed. (page 7)

General No. 7815 Agenda No. 58

October Term, A. D. 1924.

237 I.A. 662

The Jerseyvlile Motor Company, a Corporation, Appellant,

v.

The Jerseyville Nursery, a Corporation, Appellee.

Appeal from the Circuit Court of Jersey County.

SHURTLEFF, P. J.

Appellant brought suit against appellee to recover the value of a motor truck, claimed by appellant to have been sold to appellee in June, 1923. The suit was in assumpsit, based on the common counts. Appellee pleaded the general issue.

Appellant's testimony shows that it furnished appellee the motor truck with cab, of hte value of $495, and that in the sale appellee asked appellant to take a note held by it against one Marshall and his wife, and the officers of appellee stated to appellant's agents that the makers of the note were good and collectible, and that they and appellee would guarantee the payment of the note. The note was for the principal sum of $469.50, dated December 1, 1922, and to become due in one year and drawing interest at the rate of six per cent per annum. According to appellant's testimony the above arrangements and guarantee were a part of the transaction in the sale of the truck. Appellant accepted the note, which was payable to the order of Geo. W. Marshall, one of the makers, and by him indorsed in blank, and no other indorsements or marks are upon the note. The note and interest, at the time of (page 1)
transfer, amounted to $485.93, and appellant charged on its books "Balance due on truck not covered by note, $9.07" to appellee's account, which was later paid. The Marshalls failed to pay the note when due, and as the proof shows are insolvent.

It further appears from the testimony that at the time this transaction was discussed and entered into appellee did not have the note which was later turned over to appellant, and that it was not in existence, but that appellee held another note, dated December 1, 1921, for the same amount payable to appellee or order, which became due December 1, 1922, and that the Marshalls had been unable to pay the note but had paid the interest, which had been indorsed on the note.

The testimony further shows that when appellant agreed to accept the note, Wilkinson, representing appellee, had gone to the Marshalls about July 1, 1923, and had them execute the new note, dated back to December 1, 1922, and

payable to said Marshall, and Marshall had indorsed the note, none of which facts were disclosed to appellant or its agents. The note, however, represented a valid indebtedness and appellee's testimony tended to show that appellant was informed that appellee could not and would not buy a truck and pay cash for it, or take the cost out of its business; that appellee had this note and would trade it for a truck, and witnesses testified that they stated to appellant's agents to take plenty of time and investigate the note and the makers, and if upon investigation appellant desired to "trade" the truck for the note, appellee would make the trade and turn in the note at its face value. There is testimony uncontradicted that appellant's agents made some investigation of the makers of the note. Appellee was not asked to indorse the paper and the exchange was made. A jury was waived and the cause was tried before the court. There were no propositions (page 2)
of law submitted to the court. There was a finding and judgment for appellee for costs and appellant has appealed.

Where a case is tried before the court, without a jury, and no propositions of law are presented, the only questions presented on appeal are, whether the evidence supports the finding and judgment and whether the court erred in its rulings on the admissibility of evidence. **Bradhoff v. Lepman,** 181 Ill. App. 247; **Bosley Bros. v. Lawndale Iron Works,** 205 Ill. App. 602; **E. L. Essley Mach. Co. v. Daun Oil Co.** 205 Ill. App. 600; **Central Funding Co. v. Gibson,** 206 Ill. App. 236; **Bione v. Bell,** 221 Ill. App. 434. While appellant assigns error upon the court's rulings on the admissibility of evidence, no rulings are set out in the brief and argument and appellant abandons that assignment of error.

Appellant insists and cites cases to the effect that a creditor taking a note for a pre-existing debt or a contemporaneous consideration, **prima facie,** takes a note as a conditional payment only. Probably the law is stated as broadly as it should be in **McHenry v. Croft,** 163 Ill. App. 428, where the court, quoting from **Stone and Gravel Co. v. Gates Iron Works,** 124 Ill. 623, states:

"'In general, by our law, unless otherwise specially agreed, the taking of a promissory note for a pre-existing debt, or a contemporaneous consideration, is treated **prima facie,** as a conditional payment only—that is, as payment, only, if it is duly paid at maturity.' The court also quoted other authorities holding that taking the note of a third person for a pre-existing debt is no payment unless it be expressly agreed to take the note as payment, and held the decisions in this State are essentially to the same effect, citing **Walsh v. Lennon,** 98 Ill. 27, and **Wilhelm v. Schmidt,** 84 id. 185." (page 3)

But we do not see the applicability of those citations to the case before us. They would have been in point to present to the lower court upon which to base a proposition of law, and doubtless the court would have held the proposition the law applying to the case.

There is no question of fraud and deceit in this record; neither is appellant relying upon appellee's guaranty to pay the note. The guaranty could only be brought into the case by being set out specially.

There was testimony offered by appellee tending to show that appellant accepted the note as full payment to its face value upon the truck, and that there were no conditions to such acceptance, and that this acceptance was made after full investigation by appellant. At least this was one of the controverted questions of fact in the case. It has been held that where a cause is tried by the court, without a jury, the finding and judgment of the court on controverted questions of fact are entitled to as much weight as the verdict of a jury and will not be set aside by a reviewing court unless clearly and manifestly against the weight of the evidence. **Lidgerwood M'f'g. Co. v. Robinson & Son,** 198 Ill. App. 604; **Rosenfield v. Ehrhart,** 202 Ill. App. 617; **McCracken v. First Nat. Bank,** 204 Ill. App. 20.

The finding of the trial court will not be disturbed, as against the weight of the evidence, where there is some evidence to sustain it. **Soucy v. Rothschild,** 199 Ill. App. 251.

If the record does not show upon what ground the trial judge decided the cause, his finding will not be disturbed if there is any ground upon which it may be sustained. **Wilcox v. Andrews,** 150 Ill. App. 27. (page 4)

Appellant further cites section 52 of chapter 121½ Smith-Hurd's Rev. Stat. as follows: "Section 52 (1). The seller of goods is deemed to be an unpaid seller within the meaning of this Act. * * *

"(b). When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition in which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer or otherwise." But in a very similar case this statute has been construed and held to state the rule in conformity to the common law and other cases cited by appellant and adverse to appellant's contention. **Scruggs et al v. Wood,** 215 Ill. App. 270. In this case it was held: "While the rule is that a check is only presumed a means of payment, it may be shown that a check has been accepted as absolute payment. The rule has been recognized by the Supreme Court of this State in **Bailey v. Partridge,** 134 Ill. 188; and **Strong & Wiley Bros. v. King,** 35 Ill. 9. The same

rule is announced in Daniel on Negotiable Instruments (4th Ed.) section 623."

This being the state of the record in this case, there is nothing for this court to do but affirm the judgment of the Circuit Court of Jersey County.

Judgment affirmed (page 5).

General No. 7820. Agenda No. 46.

October Term, A. D. 1924

237 I.A. 662

Frank Whittington, Appellee,

v.

J. E. Myers, Appellant.

Appeal from the Circuit Court of Shelby County, Illinois.

SHURTLEFF, P. J.

Appellee filed a bill for injunction against appellant in the Circuit Court of Shelby County, to restrain appellant from contaminating the waters flowing from springs and a small stream that runs across appellee's lands. Appellant and appellee reside upon adjoining farms. Appellee's bill charges that there is a depression or slough, rising to the northeast of appellant's farm home, which meanders in a westerly direction to a highway extending north and south through the center of the section, thence across the land of appellant, and thence in a southerly direction on appellant's land and on the west side of his house, to and across the highway running east and west on the south line of appellant's lands, into appellee's land on the south side of said highway. It then passes southward about sixty rods; thence west over appellee's lands. It is charged that the slough at its starting point and ten or twenty rods north of appellant's house, extends southward, becoming deeper and wider and that at the intersection of said ditch and the road going along appellant's premises it is about six or eight feet deep on the east side and on the west side and adjacent to the creek it is substantially level; that near said highway, on the south side, appellee owns a valuable spring, which comes out of the bank, and that during all the time he has owned the lands (page 1)
this spring has afforded, in both winter and summer, sufficient water for his stock; that it never freezes and is of great value to appellee in the watering of his stock.

It is further charged in the bill that in 1921 appellant installed in his dwelling house a water works system, known as the "Delco" system for the purpose of pumping water from a well or cistern into his house, and that in connection with the same appellant has a bath tub, water closet, wash basins on the second floor and arrangements for a sink, laundry and dishwashing conveniences on the first floor. The family of appellant consists of four persons, who are in constant use of said water system. It was further alleged that appellant constructed a sewer from this system northward from his house about forty feet, which discharged into the ravine, described in said bill, offal and

excrement from the house, polluting the stream that runs southward upon appellee's land, and the spring, which renders the water unfit for stock for drinking purposes. Appellee further charged in the bill that said stream and spring had become polluted by this sewage so that his stock would not drink the waters, had become sick and that appellee was compelled to pump large quantities of water for his stock and cattle. The bill prayed an injunction and upon notice a temporary restraining order was granted.

Appellant answered the bill, denying many of the charges in the bill and expressly averring that since the filing of the bill appellant had done everything in his power to settle and adjust the matter, and while not admitting the contamination of said waters by the means charged, appellant did have his premises and the said stream and spring surveyed by an engineer of the State Department of Health, and upon being fully advised, appellant constructed upon his premises a septic tank to take and receive all of said sewage from his house, which has resulted in abating any and all contamination to said waters, as charged in the bill, if there were (page 2)
such, and appellant asked that the bill be dismissed.

On the coming in of the answer, which was sworn to by appellant, the court, by the consent of both parties, modified the temporary injunction so that the appellant could use his water system by treating the said sewage in the septic tank as constructed, and appellee was willing to adjust the whole matter by the entry of a perpetual injunction, as modified by the temporary restraining order, while appellant insisted the bill should be dismissed. Proofs were heard by the court and a decree entered, granting a perpetual injunction, as prayed for in the bill of complaint, but permitting appellant to use said water system when the sewage is treated by the septic process, as the conditions existed at the time of the decree, and appellant was decreed to pay the costs. Appellant has brought the record to this court by appeal and assigns error.

Appellant urges as a ground for reversal that equity, in granting an injunction, acts in the present and relief is dependent upon present and future conditions rather than solely on the conditions existing when the suit was brought, citing **Midland Press v. T. E. Compton & Co.**, 204 Ill. App. 216, and other cases. In the case cited complainant's relief was based upon a written contract for personal services, and it was held that the contract having expired it would be a work of superrogation for an appellate court to grant an injunction. The cases are not applicable to the facts in this case. It is further urged by appellant that where there is a substantial dispute as to the fact or the law, and the question is in doubt, a trial at law will be required before

equity will intervene, citing **City of Pana v. Washed Coal Co.,** 260 Ill., 111. In **City of Pana v. Washed Coal Co., supra,** it was held:

"The general rule, formerly strictly enforced, was, that a court (page 3)
of equity would not interfere to restrain a nuisance unless the right so to do was first established in a court of law; but this rule has been somewhat relaxed in modern times, and when the case is clear, so as to be free from substantial doubt as to the right to relief, or it is evident that a nuisance **per se** exists, equitable relief may be granted without first resorting to an action at law. (**Village of Dwight v. Hayes,** 150 Ill. 273; 1 High on Injunctions, 3d ed., sec. 748; 2 Joyce on Injunctions, sec. 1064; 29 Cyc. 1230.)"

The pollution of streams, water courses and sources of water supply has been held a nuisance **per se** in so many cases that it is not necessary to cite any of the numerous authorities to that effect, establishing an elementary principle of equity jurisdiction. And an injunction will issue where the act complained of will inevitably result in a nuisance before any actual nuisance has been committed. **Wahle v. Reinbach,** 76 Ill. 325; **Cragg v. Levinson,** 141 Ill. App. 543, and **Gilmore v. Royal Salt Co.,** 84 Kansas, 729 (34 L. R. A. N. S. 48.)

In Wahle v. Reinbach, supra, it was held: "It is said, in Kerr on Injunctions, **ubi supra:** 'The court will not, in general, interfere until an actual nuisance has been committed, but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance.' See also Wood on the 'Law of Nuisance,' 812, sec. 769."

It is held in the same case, quoting the same author:

"It is laid down by the author last referred to, p. 566, sec. 572: 'Privies are regarded as **prima facie** nuisances, and although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet if they are built or (page 4)
allowed to remain in such a condition as to annoy others in the proper enjoyment of **their** property, by reason either of the noisome smells that arise therefrom or by the escape of filthy matter therefrom upon the premises of another, or so as to corrupt the water of a well or spring, they are nuisances in fact,' etc."

In the case at bar there was no question raised as to the existence of the nuisance upon appellant's premises and its close proximity to the stream and springs upon appellee's land. It was shown, without controversy, that whenever there were rains the offal and excrement from appellant's

sewer was washed down upon appellee's land and into the springs and water, although the swale or depression upon appellant's land at other times was dry and not a running stream.

Taking into consideration all of the testimony offered, which was heard by the court, including the surveys made by the representatives of the State Health Department, we are not prepared to say that the record does not fully and clearly justify the decree. There was some dispute among the witnesses as to whether actual damage had been done to appellee's spring and stream of water, but the record clearly establishes the existence of a continuing and menacing nuisance capable of doing injury at any time and upon the authority of the cases cited appellee was entitled to have the nuisance abated.

The decree of the Circuit Court of Shelby County should be and is affirmed.

Affirmed (page 5).

General No. 7773. Agenda 9.

October Term, A. D. 1924.

237 I.A. 662

State Trust and Savings Bank, Appellee,

vs.

W. N. Van Matre, Jr., and T. M. Ellis, Jr., Appellants.

Appeal from the City Court of Mattoon.

CROW, J.

This cause comes by appeal from an order of the City Court of Mattoon, refusing to vacate a judgment by confession against appellants in favor of appellee. The judgment was entered upon a promissory note due ninety days after date, December 26, 1923, for the sum of $3,371.75, at the March Term, 1924, under and by virtue of a power of attorney fully authorizing it, upon a declaration and **cognovit.** The note was in the common form of a "judgment note" and provided for costs and an attorney fee of ten per cent. of its face.

The abstract of the record prepared by appellants is so defective we cannot know definitely what was done. With reference to the motion it recites: "Motion of appellants to set aside judgment and stay execution and leave to plead." No motion is printed in the abstract. Appellee has in its brief what it calls an "Additional Abstract." It is quite as full of information and just as reliable, and no more, as the abstract of appellants on this vital point. It recites: "There was no motion for leave to plead, and the phrase 'leave to plead' should be stricken from the abstract filed by appellant at page 2 (Rec. pp. 5 and 6), page 3 (Rec. p. 15), and from the second and third assignments of errors and the conclusion to the assignment of errors shown in appellants' abstract on page 8."

The statement of appellee finds fault with appellants for their poor performance in abstracting. Neither has aided us. Under the rules a party not satisfied with the adversary's abstract may file an additional abstract. But that was not done here. To counsel for appellants we commend the opinion of the (page 1)
venerable Justice Gary in Bishop v. Loewus, 63 App. 351. To counsel for appellee we commend the opinion of the late Justice Cartwright in Hand v. Waddell, 167 Ill. 402 (405). It must be understood cases on appeal are decided upon the merits shown in the abstracts prepared in the manner prescribed by the rules of the reviewing court. (Gibler v. Mattoon, 167 Ill. 18-22), with exceptions arising out of the nature of the record—such as original documents, numerous photostat copies, and the like.

An affidavit was filed at the May Term succeeding that at which the judgment was rendered on **narr.** and **cog.** Several conversations between appellants and the president of appellee are set out in it as having occurred on the question of the time appellee would carry the loan of appellants under conditions stated. They had borrowed money from the bank making the same sort of note each time. Having gone out of business at Mattoon they wished the bank to carry their loan for a year, which they say was agreed to upon conditions recited. In furtherance of the agreement it is said the parties entered into the following memorandum: "We agree to maintain a twenty per cent. (20%) balance; in return the bank agrees to carry note of $3000 for one year to be paid at that time. December 1, 1923." Signed by appellants and State Trust and Savings Bank, Frank T. Maloney, President.

Inasmuch as the abstract does not contain a motion to vacate the judgment, we will not search the record to ascertain whether one was filed. Merely filing the affidavit did not furnish anything upon which the Court could act. It was necessary to have a motion in the record. It should have been supported by a tender of pleas, if a defense was relied on, that the Court might determine whether there was any substantial basis for relief against the judgment. From the facts stated in the affidavit it may be assumed the ground for relief in the mind of counsel was, the judgment was rendered in violation of an agreement for an extension of time to pay the note. The note had matured when the judgment was entered (page 2).

While the abstract is meager (it should set forth the note **in haec verba)** it is shown the note was dated December 26, 1923, due ninety days after date, and that there was attached to it as part of it a power of attorney to enter the appearance of the makers and to confess judgment **at any time thereafter** in any court, waiving the issuance and service of process, not only for the amount due on principal and interest but for attorneys fees. So far as we can see the judgment complained of was entered in every way in strict compliance with the power conferred. When it was conferred it superseded any and all previous agreements and the makers were bound by it. A plea, if tendered, setting up any former agreement as a bar would have been bad and would not have aided the affidavit, even if there had been a motion. Royal v. Baxter, 66 Ill. 416; Payne v. Weible, 30 Ill. 171; Pitts Manufacturing Co. v. Bank, 121 Ill. 582. A motion to set aside a judgment appeals to the equitable jurisdiction of the court and will be allowed only upon equitable grounds. Packer v. Roberts, 140 Ill. 9.

Error not being made apparent, the order of the City Court of Mattoon is affirmed.

Affirmed (page 3).

General No. 7797. Agenda 30.

October Term, A. D. 1924.

237 I.A. 662

J. A. Morton, Appellee,

vs.

Phillipo DiCenso and Theresa DiCenso, Appellants,
and Charles G. Wineteer, Appellee.

Appeal from the Circuit Court of Sangamon County.

CROW, J.

The suit was in equity by Morton Wineteer and appellants to foreclose a mortgage on real estate. The cause was referred to the Master to take and report evidence and findings of fact and recommend a decree. He made a report finding that the defendant, the cross-complainant, Wineteer, was entitled as between himself and the DiCensos to have the security for said indebtedness first exhausted before charging Wineteer with personal liability, and that the prayer of cross-complainant that the mortgaged premises be decreed to be a primary fund for the payment of said indebtedness should be granted. The Court having rendered a decree in conformity with the report, this appeal is prosecuted to reverse it.

There was an answer by Wineteer admitting he signed the notes and mortgage as charged in the original bill. That subsequent thereto the DiCensos filed a bill for accounting against him wherein they charged him with the amount of the mortgage; that the mortgage was offered in evidence before the Master on that hearing and they claimed credit therefor; that the Master charged defendant (Wineteer) with the same, but found the DiCensos were indebted to him in excess of that amount; that they filed exceptions to said report which the Court overruled and confirmed the report; that on appeal to the Appellate Court the decree was affirmed; that the decision is conclusive upon them and binds them to pay said indebtedness to the complainant in exoneration of the liability of defendant.

With the answer a cross-bill was filed, stating (page 1) cross-complainant's case in almost the identical language of the answer, concluding with the averments of a decree and affirmance by this Court and charging that by those adjudications it was established that "in respect to the payment of said mortgage, cross-complainant is only a surety, that the DiCensos are the principal obligors and that the real estate described in the mortgage is the primary fund for payment and satisfaction."

In their answer, defendants to the cross-bill (appellants) deny all the facts and conclusions drawn by cross-complain-

ant as to the binding effect of the decree of the Circuit Court and its affirmance. But they admit that their solicitor in the suit for accounting "charged against cross-complainant the amount secured by said mortgage and they aver the same was done under the mistaken belief that they were then legally bound for the payment of said sum of money but have since learned that the acts of said cross-complainant in executing said mortgage in no way binds these defendants or their property."

It appears therefore, that the validity of the decree now before us depends in part on the sufficiency of the decree or judgment rendered by the Circuit Court in former litigation and the proceedings therein for an accounting.

We cannot ascertain from the abstract furnished whether that is or is not true. The transcript of the record is here for the purpose of conferring jurisdiction on this Court to decide the cause on appeal. It is jurisdictional But for the purpose of review we will not go to the transcript. It is part of the law of procedure on review that a party complaining of error must furnish an abstract of the record sufficiently full and reliable to present every question upon which a decision is invoked or upon which it depends. The rules require it and they are binding upon the parties, and the Court will adhere to the rule laid down for the guidance of litigants on appeal. Chamberlin v. Cary, 169 Ill. 34; Gibler v. City of Mattoon, 167 Ill. 18; Laird v. Dickerson, 241 Ill. 380; Enright v. Gibson, 119 App. 411 (417-8) (page 2).

The abstract is so imperfect that after a most careful and painstaking examination of it we cannot say whether res adjudicata or estoppel by judgment concludes the party now pleading the former adjudication. To determine that vital question the transcript should contain and the abstract should show what the pleadings were in that suit and the decree should be so fully set forth as to make it appear whether any point now in question was involved in the issues and decided in the former litigation. But it is not so set forth. If the Court in the former suit made a decree or rendered a judgment on accounting, as seems to have been the fact, and if it was within the issues then presented, it binds all parties until reversed on appeal or writ of error, however erroneous it might have been, unless there was lack of jurisdiction.

In the Master's report in this case he found that after the title to the property came to the DiCensos they filed a "suit in assumpsit for an accounting" in which they charged the defendant, Wineteer, complainant in the cross-bill and appellee here, with the sum of $2500, the proceeds of said mortgage and the judgment was entered against them on that accounting. (Abstract page 16.) The decree now

before the Court finds that in the accounting suit the plaintiff charged Wineteer with $2500, the proceeds of the mortgage, and that in stating the account Wineteer was charged with said amount of $2500, that the Master's report was approved and the judgment affirmed by the Appellate Court. (Abstract page 46.)

In the brief for appellants it is contended "a position taken in a previous suit creates an estoppel only in case where such position is taken with the knowledge of facts and is not applicable to this case, where counsel had no knowledge of the fact that the contract between Wineteer and the grantors had been recorded and where no injury was done to the party who seeks to plead the estoppel." This contention emphasizes the purpose and the necessity of fully presenting the pleadings in the former suit. If in that suit parties were concluded they cannot after- (page 3) ward re-litigate the isues or any of them then decided. Whether such matter now sought to be litigated was decided, can only be determined by the pleadings showing the issues, and the judgment or decree in that suit. The evidence in this case tends strongly to show the DiCensos knew everything then that is known now. If the points were brought forward then and determined against appellants, that is the end of it. If they were not actually brought forward, they are concluded because it was their duty then to put in issue and have an adjudication upon every question pertinent to the right to relief there sought. But whether the matter found in the decree now as having been then determined was before the Court, the record as abstracted being silent as to the issues, we cannot say. Error in that respect alleged against the decree now before us does not, therefore, appear. In addition to all of this, the answer of appellants to the cross-bill admits that their solicitor in the accounting suit charged the amount as found in the decree, but avers it was done under a mistaken belief they were legally bound for the payment of that sum. (Abstract page 13.) It cannot be successfully contended that a mistake as to the legal effect of the transaction will avoid an estoppel or a plea of res adjudicata. The averment in the amended bill suggests that the $2500 was probably involved in the former litigation, and decided adversely to the present appellants. It is said the judgment was only that plaintiffs "take nothing" by their said suit. But that judgment would under certain conditions of a record be a judgment in bar of any claim they might thereafter make, dependent always on the issues presented. The opinion in the case in this court, an appeal from the former judgment shows the matters then in controversy are conclusive in this.

But however that may be, we think the decree is right in holding the property of appellants liable for the amount

of the mortgage indebtedness against it. There was a controversy as to whether the clause in the deed making it subject to the mortgage was in the deed when it was executed. A careful consideration of all the evidence does not convince us that it was (page 4)
not in it. There is much in the evidence on that subject that suggests caution in relying on it. It is not an unusual clause. There is nothing therefore inherently improbable about its being in the deed. We are not justified under the evidence in reversing the decree on that question of fact.

Having taken the title subject to the mortgage, the law attaches certain consequences to the condition. In the absence of authority, we would conclude that one having accepted a conveyance of real estate with the condition that the title conveyed is **subject** to an existing mortgage, his property right would be affected in some way by the conveyance. The only reasonable conclusion would be that his enjoyment of title is subordinated to the satisfaction of the mortgage. Literally, his title is **thrown under** the mortgage, thereby necessarily rendering the mortgage superior to it. The course of judicial decisions is to that effect.

Leading to the application of the above principle, in Boling v. Boling, 245 Ill. 613 (616), a son having taken title by deed from his father with a condition annexed, it was held he took the title subject to the condition although he contended he did not know of it when made. The Court said he could not claim title under the deed and repudiate part of its terms. In Comstock v. Hitt, 37 Ill. 542, the grantee took title subject to a bond. It was held he was not personally bound to discharge the obligation but that the lots were subject to the payment as the primary fund. In Fowler v. Fay, 62 Ill. 375, where title was conveyed subject to a mortgage, that case was followed, Lawrence, Chief Justice, saying: "But it was decided by this Court in Comstock v. Hitt, 37 Ill. 546, that such a clause in a deed creates no personal liability on the part of the grantee to pay the outstanding incumbrance unless he has specially agreed to do so, or the amount of the incumbrance has been deducted from the purchase price. The effect of the clause, it was there held, was merely to make the land the primary fund, as between all the parties for the payment of the debt." In Fish v. Glover, 154 (page 5)
Ill. 86, (93), it is said: "It has been held that where the owner of land sells it subject to the mortgage executed by himself, the land in equity becomes the primary fund for the payment of the debt, and the vendor occupies the position of surety, and upon payment of the mortgage debts is entitled to be subrogated to the rights of the creditor the same as any other surety." (Citing authorities.)

Such is the effect of the decree here. If bound for the

4.) 4666 A

James A. Skillman and Cleon F. Skillman, Appellants, v.
Modern Woodmen of America, Appellee.

237 I.A. 662

Gen. No. 7,807.

1. [illegible]

A by-law adopted by a fraternal beneficial society substituting the period of life expectancy of a member for the common law or statutory period for the presumption of death in case of the disappearance of a member and postponing the rights of beneficiaries until the expiration of that period is reasonable and valid.

2. [illegible]

In a suit by the beneficiaries under a fraternal benefit certificate to recover as for death of a member who had disappeared, where plaintiffs in their replication set up a part of the correspondence with defendant's general counsel tending to show an estoppel defendant properly met such plea by a rejoinder setting up the entire correspondence.

General No. 18[illegible]. Agenda 57.

October Term, A. D. 1924.

James A Skillman and Cleon F. Skillman, Appellants,

vs.

Modern Woodmen of America, Appellee.

Appeal from Circuit Court of McLean County.

237 I.A. 662

CROW, J.

This case comes on appeal from a judgment of the Circuit Court rendered upon demurrers. The action was brought by appellants upon a certificate of membership of James B. Skillman in appellee society. The pleadings on behalf of both parties are lengthy and somewhat involved. The transcript consists of 167 pages and the abstract of 63 pages. But for the purpose of determining the correctness of the judgment appealed from, it is deemed necessary to set them out in substance only. The first count was abandoned. All pleadings arise out of the second and the additional count.

Appellee is a fraternal benefit society pursuant to its charter under an act of the legislature of 1883, amended in 1893. James B. Skillman became a member of the association and the certificate of membership, on which suit is brought, was issued to him in 1900, payable to his wife. In 1912 he went to the State of Texas and was never heard from afterward, except by one letter written on his arrival in Texas. The second count of the declaration avers his disappearance and continued absence without tidings and that "James B. Skillman is dead and has been dead since the 19th day of October, 1919." It is further averred that proofs of death were made April 25, 1920, that the claim was rejected and payment of it refused September 15, 1920. That Skillman fully complied with the by-laws during his life; that the beneficiary named in the certificate was, on her action, divorced from James B. Skillman in 1915, and thereby he "met a civil death in so far as her relations with said Skillman are concerned, and the plaintiff, his children, became the beneficiaries."

The additional count contains substantially the facts contained in the second, averring defendant delivered to Skillman a benefit certificate which was accepted by him and by its terms defendant agreed to pay his wife $3000; that the contract between defendant and Skillman consists of the charter of defendant, including the statute under which it is organized, the by-laws legally enacted under the powers contained in the charter by the legally elected delegates of the defendant society, the application for member-

ship, and the certificate issued to Skillman in compliance with its charter and by-laws; that the by-laws provide that the benefit certificates shall be incontestable after seven years "so far as affected by warranties and agreements" contained in the original application, concluding with allegations as to Skillman's disappearance and absence and that he is dead and has been dead since October 19, 1919, and that he fully complied with the rules and by-laws.

To the counts defendant tendered the general issue and filed five special pleas, to which the court overruled a demurrer. The first ~~speical~~ plea avers the business of defendant to be that of a fraternal benefit society and that with Skillman it entered into a contract consisting of its charter and by-laws, the application for membership, and the benefit certificate issued to and accepted by him. That, among others, there were provisions in the by-laws that the application and by-laws form the sole basis of applicant's admission to membership and of any benefit certificate to be issued; that applicant agreed such by-laws then in force and any thereafter enacted became a part of every contract by and between the members and govern all rights thereunder; that he waived for himself and beneficiaries all claim of benefit under his application until approved and adopted by the authorities specified; that there should be no liability on the certificate in case of death without full compliance with the by-laws; that the certificate issued to and accepted by Skillman and made part of the plea contained the pro-
~~(page 2)~~
vision that beneficiaries should only be entitled to benefits when all conditions contained in the certificate and the by-laws of the society as the same now exist or may be hereafter modified or enacted shall be fully complied with; nor shall any action be maintained until after proofs of death and claimant's rights to benefits as provided in the by-laws have been filed with the Head Clerk and passed upon by the Board of Directors, ~~nor~~ unless brought within one year from the date of action by said Board; that the certificate and contract is and shall be subject to forfeiture for any cause then existing or that might thereafter be prescribed by amendment to the by-laws; that from and after September 1, 1917, and at the commencement of the suit, the by-laws contained certain provisions with regard to proofs of death and that furnishing such proofs should be a condition precedent to liability and that the Board of Directors only was authorized to determine liability of the society for benefits; that April 13, 1920, plaintiffs filed with the defendant proofs of the alleged death of Skillman and claim for $3000 benefits alleged to be due them under the certificate, and on September 15, 1920, the Board of Directors passed upon said proofs and denied plaintiffs claim for

benefits and notified them of said rejection, and that their action was not brought within one year from the date of said rejection.

The fourth special plea contained the same averments, except it averred a change of defendant's by-laws duly made in 1917, by which it was provided no action should be maintained for a death claim unless brought within ~~eighteen~~ 18 months from the date of the death of the member, averring the action was not so brought.

The fifth special plea by apt averments shows the adoption by defendant's supreme legislative body of section 66 of its by-laws, substituting expectancy of life for the event of death as ground of liability, and pleads it, with proper averments, in bar of plaintiffs' action. This plea and the section of the by-laws will be considered hereafter. The plea concludes: "Defendant further avers that the proof of the actual death of the said James B. Skillman, as required ~~(page 3)~~ in the by-laws aforesaid, has never been furnished to the defendant; and the expectancy of life of the said James B. Skillman, according to the National Fraternal Congress Table of Mortality has not yet expired, and this the defendant is ready to verify." To the second and third special pleas demurrers were sustained. Error not being assigned thereon, they need not be noticed. Demurrer to the fifth special plea having been overruled, plaintiffs abided their demurrer.

To the first and fourth special pleas plaintiffs filed four special replications. The first replication, stripped of surplus averments, sets up Section 56 of the by-laws of defendant to the effect that Skillman had been a member with payment of all dues and assessments, etc., and that the said section provides that after seven years from the date of delivery and acceptance of said certificate the said certificate shall be incontestable so far as affected by warranties and agreements contained in the original application, other than those relating to certain provisions stated, and concludes by averring said limitations pleaded and the matters therein pleaded, have no application to the pending suit and are of no binding force on the plaintiffs. The second replication avers the provisions of the contract limiting the right of action to one year, as contained in the first special plea, and to 18 months as contained in the fourth, are of no validity because they were not established and provided by a head camp, composed of delegates from local camps and the officers of the society, and said regulations and by-laws are null and void and of no binding force on plaintiffs nor on James B. Skillman.

The third replication to the first and fourth pleas is of an estoppel arising out of the alleged conduct of the defend-

ant in a former suit pending on the same policy, because in that action, on October 21, 1920, defendant pleaded in bar of an action then pending on the same certificate, and for the same cause, certain conditions in the certificate, to-wit, the provisions of section 66, and that is thereupon averred, in bar of that action "that proof of the actual death of Skillman has never been furnished to defendant, ~~(page 4)~~ and the expectancy of life of the said Skillman, according to the National Fraternal Congress Table of Mortality, has not expired." The plaintiffs further aver that they accepted said plea of the defendant as true in fact and that the facts set forth in said plea they believed to be true; and that the cause of action to which the plea is interposed they believed to be prematurely brought, and that they believed that by reason of the allegations in said plea the plaintiffs did accept said plea as stating the essential elements of the contract, when in fact the said by-law 66, set out in said plea, was contrary to the charter of the defendant society, and the defendant well knew the contents of the charter while the plaintiffs did not, and by reason of the said conflict the said by-law 66 was wholly void, but the plaintiffs believing the plea to be true, the plaintiffs discontinued said suit, and with the purpose of complying with said plea the plaintiffs paid dues and assessments levied against said Skillman by reason of the benefits carried in the defendant society up to the time of bringing this suit, and the said dues and assessments were regularly levied by defendant against said Skillman in the same way as if he were alive, and defendant accepted all said dues and assessments, and that plaintiffs were not informed of the invalidity of by-law 66 until two weeks before the bringing of this suit. The plaintiffs further aver that by reason of the acts and conduct of the defendant they have been misled to their injury in dismissing said suit, and that by reason of the acts of the defendant in accepting dues and payments on the benefits carried in the said society from these plaintiffs, the defendant is estopped to set up said limitations contained in the first and fourth pleas against the plaintiffs as a bar to their action." Demurrer to this replication was sustained.

The fourth replication is of an estoppel against defendant to plead the time limit set up as a defense in the first and fourth pleas. It is an estoppel to assert a defense under section 66 of the by-laws, relating to disappearance of members and providing that time of disappearance should not raise a presumption of death unless the full term of life under the expectancy had expired. That they ~~(page 5)~~ were misled by the decision of the Supreme Court in the **Steen case** and the insistence of defendant that by-law 66 was valid; that they had no knowledge the charter fixed the

quality of evidence required to establish satisfactory evidence of death and when they learned of the charter they begun their action and that by reason of defendant's conduct defendant had waived the limitation set up in the pleas. To this replication the court sustained a demurrer.

Thereupon plaintiffs filed a fifth replication to the first and fourth special pleas. In that replication, they say in substance, they furnished evidence of the death of Skillman because of his disappearance and seven years absence, but they say said evidence so furnished to the defendant is no evidence of the death of Skillman by reason of the matters pleaded in each of the said pleas and that there is no proof of death under defendant's by-law with proof of actual death, because there was another by-law of defendant purporting to be in force and effect at the time when such proofs were made, quoting by-law 66. The plaintiffs further allege that, after filing proofs, there was some correspondence between the attorneys for plaintiffs and the general attorney of defendant as to whether the said limitations as to the time within which suit must be brought, had any operation upon the proofs furnished by the plaintiffs to the defendant, and that the general attorney of the defendant replied that "our by-law simply postpones the time when the assumption of death shall arise, and fixes it at the expiration of the expectancy. Under the by-law there is no death until that time, and it follows from this that no limitation could be successfully pleaded." And plaintiffs further allege that this suit is not maintained by reason of the by-laws of the defendant, but under the provision of the charter, and that by reason of said by-law, plaintiffs has no right of action against the defendant, and plaintiffs are not therefore barred.

Demurrer to this replication having been overruled, defendant filed a rejoinder setting out at large the correspondence (page 6) between plaintiffs' then attorney and the general attorney of defendant, in which, in substance, attorney for defendant then claimed and insisted that no suit can be begun until the expiration of the expectancy of the life of Skillman, at which time a suit could be maintained and that if action were postponed until that time, the defense of limitation of action would not be interposed. Demurrer to this rejoinder having been overruled, plaintiffs abided the demurrer and the court rendered judgment on the pleadings for the defendant. The sole question presented for determination is as to the effect of section 66 of the by-laws upon the right to maintain this action.

The object of life insurance is indemnity to surviving relatives or designated persons in the event of the death of the person whose life is insured. Where the policy provides

for the payment of a sum of money on the death of the insured, death must be proved as a condition precedent to the right of recovery. Death is cessation of life. Every life insurance policy imports that contingency. All policies provide for proofs of death—the establishment of the fact of death, its cause and attendant circumstances. There are no varieties. Generally the proofs required are sworn statements or certificates of persons cognizant of the fact. Relatives, close friends, attending physicians in last illness, undertakers conducting the funeral and interment and clergymen performing funeral rites, are those whose avouchment of death is generally required. Certitude of death is a **sine qua non** to the maturity, the accrual of the right to demand such indemnity. Did he die? Who saw him dead? What is the evidence of death? These are integrant facts in suits of this character.

In the action on the certificate in this case, there are averments of death in the several counts. In each it is averred, as a deduction from the fact that he had been absent unheard of for more than seven years, that "the said James Skillman is dead and has been dead since the nineteenth day of October, 1919." The counts aver that "plaintiffs furnished satisfactory evidence of ~~(page 7)~~ the death of said James B. Skillman to the defendant," which were rejected. These averments are tacit admissions of the necessity of two of the elements essential to a recovery—death and satisfactory evidence of death of the insured. Taking the pleading of the plaintiffs most strongly against them, there is no pretense of death. The averment of death is so intimately associated with the averments of absence unheard of for a period of more than seven years, that we must accept as true the assumption of a common-law rule of evidence of death and the conclusion from the rule, "therefore he is dead."

The question at bar is not whether the rule is valid as a rule of evidence, but whether under the state of the record now under review, it is applicable and conclusive as claimed for it. Otherwise stated, by granting the rule, as it must be granted for some purposes, must we necessarily conclude that Skillman is dead as averred, so as to require a judgment against defendant? If no other basis of presumption, or valid agreement as to a basis of inference of death exists, the common-law rule would be sufficient to justify it as the rule is defined, explained and limited by Chief Justice Breese in Whiting v. Nicholl, 46 Ill. 230. But this case is not presented as one affecting the rights of parties fixed by law independent of contract as in that case. In that, defendant in error had a decree for dower as the widow of her husband who disappeared and remained from his home and friends unheard of for a period of more than seven years

before filing her bill. In the circuit court she recovered dower because of her status as widow. The essentials to dower required by law—marriage, seizin of the husband, and death of the husband—were established. No other rule or principle of evidence was available. To those elements proved at the hearing, the law attached the right of dower. Death so established authorized it.

In this case the rights of the respective parties arise not out of law and relations created by law, but out of contract. The elementary doctrine is that the contract of parties is the law of the parties, if not inhibited by some rule of positive law or ~~(page 8)~~ principle of public policy. The general rules as to limitation of actions at law may be modified by agreement. Often, if not always, they are now modified in insurance contracts. Such contracts are sustained in this state, without the aid of legislative sanction. Rules and principles of evidence are foundations for belief in propositions submitted for investigation. They are commonly the growth of experience and the observed order of things and events. Statutes sometimes declare that on proof of certain facts others shall be inferred or deny the right to infer certain state of things from others proved. In the **Steen case** hereafter referred to it is shown the rule relied on originated in an English Statute. Why may not competent parties with equal propriety and for mutual protection agree that an inference of death shall not be drawn from one condition arbitrarily fixed and generating no rational belief and allow the inference from another more nearly guaranteed by much experience and observation and generating a rational belief? There is nothing arbitrary about it. The insured has agreed to it. One of the conditions upon which he became a beneficiary member of the society was he accepted and agreed to be bound by all the by-laws then in force or that might thereafter be enacted. To the same extent he bound the beneficiaries. It is in the record, though not proof of the fact, that defendant constantly has pending claims on more than four hundred "disappearance cases." (Letter from defendant's attorney in the rejoinder, Abstract, page 57.) The aggregate of claims, if each certificate is for $3,000, is $1,200,000. There is certainly nothing impolitic in postponing the collection of those claims until the expectancy of the lives has expired instead of shortening the period in some cases to seven years. Extending the period tends to discourage fraud.

Death being the only condition upon which the certificate, by stipulation of parties, could become due and payable, it was necessary to aver in the declaration the insured was dead. This averment being made in the manner noticed above, was a confession ~~(page 9)~~ plaintiffs were not relying on the fact of death established

in the usual way and in the manner required by the certificate. The evidence of death is stated. If death had been averred and proofs waived, the evidence pleaded would have been relevant in the absence of any other. Defendant accepted the averment and proceeded in the manner of good pleading to meet it. It did not meet it by denial, which would only have placed plaintiffs under the legal obligation of proving the absence for seven years unheard of by those who would likely have heard from him if he were alive. It did not put in issue the absence. The conclusion would follow, if not avoided by a plea setting up new matter nullifying it.

To meet the necessity, defendant filed the fifth special plea. It averred the existence of the corporation under legislative authority, the plan of organization and its constituent organs, the general plan of operation and the purposes of organization. It further averred defendant's duly and regularly constituted Head Camp, held in the month of June, 1908, consisting of more than 600 duly-elected delegates and nine officers entitled to vote, duly and regularly enacted the by-law following, effective and in full force and effect from and after September 1, 1908, and that it ever since has been and still is in full force and effect:

"Sec. 66. Disappearance no Presumption of Death. No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the society, without proof of actual death of the member, while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. Disappearance or long-continued absence of any member unheard of shall not be regarded as evidence of death, or give any right to recover on any benefit certificates heretofore or hereafter issued by this society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of the common law of any state or country to the contrary notwithstanding. The term "within the life of the benefit certificate," as here used, means that the benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the society have been made." ~~(page 10)~~

All averments necessary to make this by-law valid and applicable to the claim were fully made and the plea concludes: "defendant further avers that proof of the actual death of the said James B. Skillman, as required ~~in~~ the by-laws aforesaid, has never been furnished to the defendant, and the expectancy of life of the said James B. Skillman, according to the National Fraternal Congress Table of Mor-

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tality has not yet expired, and this the defendant is ready to verify." The Court overruled a demurrer to the plea and plaintiffs having abided the demurrer, the question to be determined is whether it is a bar to the action.

We are relieved of elaborate argument in support of the judgment of the Circuit Court by the effective and well-reasoned opinion of Mr. Justice Thompson in Steen v. Modern Woodmen, 296 Ill. 104. The learned justice in that case, in an opinion without dissent and upon the most thorough consideration of the identical clause now under discussion, held it a valid provision in substitution of the common-law rule of evidence relied on by appellants; that as a rule of evidence it is a conventional substitute for the seven years rule, the history of which is accurately stated.

Beyond the points so clearly decided, it is irrefutably shown in the opinion that the society in adopting the by-law, instead of being subject to animadversion, has acted within the bounds of commendable fairness, both to the beneficiaries and to the members of the society. In impressive contrast with the by-law under consideration, reference is made to the drastic by-law held valid in Apitz v. Supreme Lodge Knights and Ladies of Honor, 214 Ill. 196. Of that by-law, the Court say: "It provided that if a relief fund member disappeared from his home and nothing was heard from him by his family or the secretary of his lodge, and no information could be had concerning him after diligent inquiry, and such disappearance continued for a period of one year, said member stood suspended as in case of suspension for non-payment of assessments. Under a by-law like that in the **Apitz case** the beneficiary would (page 11) have no right to continue payment of the assessments in order to keep the certificate alive, and if the member should re-appear any time after the close of the first year's absence and should be unable to comply with the requirements of the society for re-instatement of members suspended for non-payment of assessments, then all rights under the contract would be lost."

The fallacy of denouncing the by-law as unreasonable is further illustrated by the application of the mortality tables to assumed cases. It being contended the substitution of the expectancy rule for the seven years rule is harsh and unfair to beneficiaries, the contention is overthrown by the obvious fact that if a member's expectancy is less than seven years, the supposed hardship vanishes and the conventional rule at once becomes a beneficence. The rights of beneficiaries, instead of being postponed, earlier become effective. The epithet applied will depend, not on the rule, but the condition calling for its application. In the case at bar and in the **Steen case**, we would hear nothing of the sanctity of the common-law presumption of death if the expectancy

were less than seven years. The accidental circumstance of advantage or disadvantage to beneficiaries in the application of a general rule is the basis for the contention as to merit or demerit, to validity or invalidity of one rule or the other. General rules always operate with impartiality. The validity and applicability of by-law 66 pleaded as a bar is no longer an open question in this jurisdiction. In V. & M. R. R. Co. v. Putnam, 118 U. S. 545, 30 L. Ed. 257, involving the probable duration of life in an action for damages, the Supreme Court of the United States, by Mr. Justice Gray, say: "Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. Standard tables are competent to assist juries in arriving at the probable duration of life. If competent to assist in arriving at the probable duration of life, they are necessarily quite as competent to assist in arriving at the probable time of its termination. ~~(page 12)~~ But what is such a by-law unfair if neither the member nor the beneficiaries contemplated disappearance when the certificate was issued?

The circuit court having held the plea good as a bar, necessarily held the by-law valid as a foundation of the bar. The plea goes to the right of recovery. Being a bar, no recovery can be had and further consideration of the case would be unnecessary but for other pleadings to be now noticed.

To the second count and the additional count charging, so far as necessary now to be noticed, the same cause of action, defendant filed four special pleas. The first, after setting forth the pertinent conditions of the contract between the member and the society, among them that no action should be maintained unless begun within one year after the rejection of proofs of death, averred plaintiffs did not begin their action within said time. The fourth special plea was the same as the first, except that it averred that after the contract was entered into, the by-laws were amended in 1917, providing that no action should be maintained unless begun within 18 months from the date of death of the member, and that the action was not so begun. That being true the action was barred, for plaintiffs were relying on a right of recovery on account of death under the terms of the certificate.

To the first and fourth special pleas five special replications were filed. To the first four replications the court sustained a demurrer, and overruled it as to the fifth. To the last replication defendant filed a special rejoinder. The theory of plaintiffs' replication was that, on account of certain correspondence, between the attorney for plaintiffs and the attorney for defendant, defendant was estopped to set up the "disappearance by-law" as a defense. The court

upon the facts as pleaded, judged by the ruling, adopted that theory. The defendant was thereupon confronted with the necessity of denying the fact of correspondence made the basis of estoppel or of contesting the conclusion by setting up matter not appearing in the replication. It adopted the latter (page 13)

alternative and set forth in a special rejoinder the entire correspondence, a part only of which was supposed to lead to the conclusion. It was apparent from the correspondence fully set out that defendant was not estopped. Not only did the attorney for defendant insist upon the defense, but stated frankly if plaintiffs waited until, under the provisions of the by-law, death, as a matter of inference should be established, and all other terms of the contract were complied with, no plea of limitation would be interposed. The correspondence is lengthly. No useful purpose would be subserved by noticing it more fully. The court overruled a demurrer to the rejoinder. Plaintiffs could not successfully deny the facts, nor avoid the conclusion and therefore abided their demurrer. The court thereupon on their admission properly rendered judgment against them as matter of law on the question of estoppel.

Plaintiffs insist that the rejoinder was a departure in pleading and therefore not valid as an avoidance of their conclusion in the replication. The alleged departure consists of setting up, among others, by-law 66. But that section and others was necessary to show the subject matter of the correspondence partially pleaded in the replication and completely pleaded in the rejoinder. Its legal effect was the subject of the correspondence. By-law 76 provides, "no action for recovery on a death claim based on any benefit certificate heretofore or hereafter issued by this society can or shall be maintained until proofs of death and claimant's rights to the benefits, under the by-laws shall have been filed with the head clerk." A death claim is the only one that could be made. That was the purport of the correspondence. This provision in connection with by-law 66 shows the pleader had in mind, as did the society, not death, but, in the absence of it, satisfactory proofs of facts making by-law 66 applicable as a substitute for the presumption of death, and therefore creating liability. It would be an intolerable rule that would permit plaintiffs to set up part of the facts, or part of a letter disassociated from its context, of itself sufficient to justify the conclusion of estoppel (page 11)

and forbid his adversary setting up all of them, or the context, in this case correspondence, and thereby overcome their conclusion. At the trial if they had offered part of the correspondence its probative value could be changed, weakened or overcome by putting in evidence all of it. Like

effect here was accomplished by pleading. The method of pleading could be met in no other way as a matter of pleading. The replication spoke only a half truth. The part pleaded as a fact could be put in issue by a traverse, but the effect of it without all spread upon the record could not be reached by demurrer. When it was all in, the contention of defendant's counsel as to the legal effect was supported by the faultless argument of the opinion in the **Steen case.** The contention was not that the right of action was postponed, but that it did not then exist.

There was no "general liability to pay" as counsel for appellant contends in his brief. The court did not render judgment in abatement as an assignment of error implies, if the judgment is correctly abstracted. Neither did it commit error in permitting the fifth special plea to be filed, as assigned, for it was a plea in bar. Under our system of pleading a defendant may file as many pleas as he deems necessary to present all his defenses. Each presented a single question of fact, issue upon which was not tendered by plaintiff, but such issue was avoided, or attempted to be avoided by further pleading, or by tendering an issue of law by demurrer which is only a method of resistance to, or avoidance of, a tender of issue, or joinder of issue tendered on a fact.

Out of the wilderness of pleadings emerges the solitary question presented for judgment—is the "disappearance by-law" a bar to the action of plaintiffs? That question can be answered as matter of law only in the affirmative. The rulings of the circuit court being in harmony with this conclusion, its judgment is affirmed.

Affirmed. ~~(page 15)~~

237 I.A. 663

General No. 7772. Agenda 8.

October Term A. D. 1924

Johanna Gallivan and Gerald J. Gallivan, as Executors of the Last Will and Testament of Thomas J. Gallivan, Deceased, Appellees,

vs.

Chester & O'Byrne Transfer Company, Appellant.

Writ of Error to Champaign.

NIEHAUS, J.

It appears from the proofs in this case, that Thomas J. Gallivan was injured by coming into contact with a Yellow cab on University street in the city of Champaign, when he was returning hom from work on the night of November 14, 1922. The Yellow cab was operated by the appellant, Chester & O'Byrne Transfer Company. This suit is brought to recover damages from the appellant, for the injuries suffered by Gallivan in the collision. The trial resulted in a verdict and judgment for $3,000.00 against the appellant. This appeal is prosecuted from the judgment. The plaintiff Gallivan died after the trial, but not from the injuries received; Johanna Gallivan and Gerald J. Gallivan, as executors, were then substituted for the deceased as plaintiffs in the case.

The proof shows, that Gallivan was riding in a Ford automobile, owned and driven by James Finley. The Ford car had stopped in the street near his home; and he had alighted from the car, and had started to walk in the street, in the direction of his home. A recovery is sought, on the basis of alleged negligence in the operation of the Yellow cab, by driving the same at a greater speed than fifteen miles an hour, or at a rate of speed, greater than was reasonable and proper, having regard to the traffic, and the use of the way; negligence is also alleged in driving the Yellow cab, which was going in a westerly direction on the wrong side of the street; namely, (page 1)
the north and left hand side. The speed at which the cab was driven and the side of the street on which it was driven, were controverted questions of fact on the trial. In this state of the evidence, the court gave the jury the following instructions upon which error is assigned:

"6. The Court instructs the jury that under the law of this state if the Yellow Cab which ran into and injured the plaintiff was being driven by a servant of the defendant on University avenue, at a place where the same passes through the residence portion of the City of Urbana, in excess of fifteen miles an hour, then, under that state of the proof, such rate of speed would be prima facie evidence that the

person operating the Yellow Cab was running at a rate of speed greater than was reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of persons lawfully upon the highway; but you are further instructed that even though you may believe the defendant's servant was driving the Yellow Cab at a speed less than fifteen miles an hour, still if you believe from a preponderance of the evidence that under the circumstances such speed was greater than was reasonable and proper, then it would be your duty to find the defendant guilty of negligence."

"7. The jury are instructed that even though you may believe from the evidence in the case that the defendant's servant was driving the Yellow Cab at a rate of speed less than fifteen miles an hour, still if you further find from a preponderance of the evidence in the case that the defendant's servant was driving said automobile upon the north and left hand side of University avenue in passing a Ford automobile from which the plaintiff had just alighted and that he was in the exercise of due care and caution for his own safety at said time and that the speed at which the Yellow Cab was being driven, whether in excess of fifteen miles per hour or less, was negligence under all of the circumstances of the case, and that by reason of such negligent operation of the Yellow Cab on the part of defendant's servant that the planitiff was run into and injured while exercising due care and caution for his own safety, then under that state of proof it would be your duty to find the issues for the plaintiff and return a verdict in his favor."

"8. The jury are instructed that if the evidence shows by a preponderance that the plaintiff, together with three other men, was coming home from the Illinois Central Railroad shops and was driving west on University avenue, and that they stopped on the north side of the street near the north curb, where the plaintiff got out of the car in which he was riding, on the south side of the car, and that the defendant's Yellow Cab was coming from the west and in an easterly direction along said University avenue, and that the plaintiff's car was on the north side of the center of said street, and the plaintiff, while passing around the rear of the automobile in which he had been riding, provided you believe from a preponderance of the evidence that plaintiff did pass around the rear of said automobile, was in the exercise of due care or ordinary care such as an ordinary man

(page 2)

would exercise under like circumstances, and that the Yellow Cab was on the north side of the center of said University avenues, and struck the plaintiff, then the driving on the north side of University avenue would be prima facie negligence on the part of the driver."

Instruction No. 6, not only assumes as a matter of fact, that the Yellow cab ran into Gallivan, but also directs a verdict of guilty, if the jury believe from a preponderance of the evidence that the speed of the Yellow cab was greater than was reasonable and proper, without regard to the additional element necessary to a recovery, that Gallivan at the time of his injury was in the exercise of due care and caution for his own safety. Instructions 7 and 8, are both subject to the same criticism, and contain the same error, which was passed upon by this Court in Chandler v. Gifford 223 Ill. App. 486. In that case, it is said: "By these instructions the jury were told that it was a violation of the statute, and as a matter of law, to drive an automobile on the north side of a highway going east. While many cities and villages have ordinances requiring automobiles to keep to the right of the center of the street, and where such ordinance has been enacted, it is negligence per se to drive to the left of the center of the street; (Star Brewing Co. v. Hauck 222 Ill. 348; Lake Shore & M. S. Ry. Co. v. Parker 131 Ill. 557; Graybill v. Block 218 Ill. App. 659;) this is not the rule in this state where such ordinance has not been enacted. Public streets and highways are for the benefit of the public, and the traveling public have the right to use them in their entire width; provided, that in so doing no ordinance or statute law is violated; and provided also, that the traveler is not in fact guilty of negligence in so doing. It is a matter of general knowledge that public highways are not improved for travel for their entire width, and that frequently the entire traveled portion of the way is at one side."

It may also be pointed out concerning the proof of damages for medical treatment, and for care and nursing, and hospital expenses, that it is a necessary element in such proof (page 3)
that the charges made for these various items of indebtedness which have been paid, or incurred, were the usual and customary charges. Schmidt v. Kurrus 234 Ill. 578; Steeve v. Smith 153 Ill. App. 630.

For the reasons stated, the judgment must be reversed and the cause remanded.

Reversed and remanded. (page 4)

General No. 7781 Agenda 20

October Term, A. D. 1924.

237 I.A. 663

Belle La Fountain, Administratrix, and William La Fountain, Administrator, of the Estate of Louis La Fountain, deceased, Appellee,

vs.

Lake Erie & Western Railroad Company, a Corporation, Appellant.

Appeal from Ford.

NIEHAUS, J.

This suit was brought in the circuit court of Ford county by the appellee Belle La Fountain, as administratrix of the estate of Louis La Fountain deceased, to recover damages for the benefit of the next of kin of the deceased, whose death it is alleged, was caused by negligence of the appellant, Lake Erie & Western R'y Co. in running its train across the Derby crossing, in Ford county. The trial of the case resulted in a verdict and judgment for $2000.00 against the appellant; and this appeal is prosecuted from the judgment. It appears from the evidence, that the deceased was fatally injured while riding in a Ford Sedan car, driven by Ralph Pierucinni, on the public highway at the crossing mentioned, where the car came into collision with appellant's train. It is urged for reversal of the judgment, that the charges of negligence in the declaration were not proven. The declaration charges general negligence in the management of appellant's train; and a failure to give the statutory warning signals for the crossing. There is a clear conflict in the evidence concerning the matter of the ringing of the bell at and within the eighty rod limit fixed by the statute. This was a question of fact, involving the credibility of the different witnesses who testified in reference to the matter, and a question of the weight to be given to the conflicting testimony; and therefore, for the jury's determination. It was also a question for the determination of the jury, whether or not the deceased, at the time of and immediately before the (page 1)
collision, was in the exercise of due care for his own safety; that is to say, whether he was exercising that degree of care, which an ordinary prudent person would have exercised under the same circumstances. Schneeweisz v. Illinois Central R. R. Co. 196 Ill. App. 248. There is evidence in the record tending to prove both of these necessary elements in the right of recovery, from which the jury were warranted in drawing the inference, that the appellee's right to recover damages had been established; and under these circum-

stances, this court would not be justified in saying, that the verdict is manifestly against the weight of the evidence.

It is contended that the fourth instruction given for the appellee, is erroneous. The instruction is as follows:

"You are instructed that if you believe from a preponderance of the evidence that the defendant's agents or servants in charge of the engine or train in question, neither rang the bell nor sounded the whistle, continuously for the distance of eighty rods before reaching the highway crossing in question, such omission constitutes a prima facie case of negligence on the part of the defendant; and if you further believe from the preponderance of the evidence, that Louis La Fountain, was struck and injured at the railway crossing in question, and if you further believe from the evidence that as a result of such injury the said Louis La Fountain died on the day of said injury, in consequence of the omission of the defendant in neither so ringing a bell or so sounding a whistle; and if you further believe from the evidence that he was, himself, exercising all reasonable care and caution in that behalf for his personal safety, at the time of the injury and immediately prior thereto, then the defendant is liable to the plaintiffs, as administratrix and administrator for the loss and damage sustained by the next of kin of the deceased, in their means of support by reason of such injury and death, if any such loss or damage has been proved by the evidence."

The appellant insists, that this instruction "requires of appellant a greater duty than is imposed by law; and that it assumes, that appellant was negligent in regard to the greater duty; and that the instruction told the jury, that the negligence inferred, constitutes a prima facie case of negligence." It is true, the instruction is incomplete as an abstract definition of appellant's statutory duty in regard to warning signals at highway crossings; that the definition leaves out of consideration appellant's right to comply with the statutory requirements (page 2)
of continuous warning, within the eighty rod limit, by blowing the engine whistle part of the time, and ringing the bell a part of the time before reaching the crossing; but it must be pointed out, that this feature of appellant's duty was not involved in the case, as it is clear from the evidence, that the only compliance with the statutory requirement of continuous signaling or warning of the approach of the train, which appellant sought to prove, was the continuous ringing of the engine bell; and this constituted the real uncontroverted question in the case. The appellant produced the testimony of three witnesses on this point. J. E. Hurley, the locomotive engineer who was in charge of appellant's train, testified as follows: "As I approached Derby the bell on my engine was ringing. It began to ring after I sounded

the station whistle. That was a mile from the station. It continued to ring until after we had the accident, and stopped, and backed up." The fireman on the engine, F. Huber, testified, that as the train approached Derby that day, the bell was ringing, but he could not say for sure, where it was turned on. The other witness, who testified he heard the bell ringing, was C. B. Taggart, express messenger on the train, who said, he observed the bell ringing as the train went over the crossing, but did not hear it back of that. On the part of the appellee, Ralph Pierucinni, the driver of the Ford Sedan, which collided with the train, testified positively, that no bell was ringing as the train came down the track; a number of other witnesses who were in position to hear the bell, also testified, that they did not hear any bell ringing as the train approached the crossing. The incomplete definition of appellant's duty in the instruction was therefore harmless error. It was not error to instruct the jury that proof of the non performance of a statutory duty was prima facie evidence of negligence. C. E. I. R. R. Co. v. Moschell 193 Ill. 208. The instruction is somewhat inartificially drawn, but when considered in connection with the evidence in the case, it is substantially correct as a statement of the law applicable (page 3)
to the evidence, and of appellants' duty. On the question of due care, which the law required of the deceased, the requirement in the instruction is, that he must have been in the exercise of due care at the time of the injury, and immediately prior thereto; this has been repeatedly held sufficient on that point. Peterson v. C. T. Co. 231 Ill. 324. Krieger v. A. E. C. R. Co. 242 Ill. 544. There was no error in the denial of the appellants' motion to allow the jury to view the premises, or place where the collision occurred

For the reasons stated, the judgment is affirmed.

Judgment affirmed (page 4).

General No. 7791. Agenda 26.

October Term, A. D. 1924.

237 I.A. 663

Kewanee Securities Company, a Corporation, Appellee,

vs.

Augusta M. Glawe and Elmer H. Glawe, Appellants.

Appeal from Macon.

NIEHAUS, J.

In this case the appellee, Kewanee Securities Company, on March 5, 1924, had a judgment entered by confession for the sum of $1733.87 in the circuit court of Macon county. The judgment was entered on three judgment notes, against the appellants, Augusta M. Glawe and Elmer D. Glawe. Thereafter the appellants appeared in court, and made a motion to open the judgment; and for leave to plead their alleged defense to the notes and power of attorney upon which the judgment was based; and in support of their motion, filed the affidavits of Elmer D. Glawe and Augusta M. Glawe. The motion was denied by the court; and this appeal is prosecuted from the order denying the leave to plead in defense. It is sufficient to say concerning the questions presented on appeal, that the matters set up in the affidavits filed in support of appellants' motion, presented a sufficient prima facie showing, that the signatures of the appellants to the notes were obtained by fraud. Section 10, of the Negotiable Instrument Act provides, that if any fraud or circumvention be used in obtaining the making or executing of any promissory note, such a defense may be availed of against any assignee of the note, as well as against the party committing such fraud. Delfosse v. Kendall, 283 Ill. 301. The motion should therefore have been granted, and leave given the appellants to plead their defense. The order of the court denying the motion is therefore reversed; and the cause is remanded with directions to grant the motion of the appellants, and allow them to plead.

Reversed and remanded with directions (page 1).

General No. 7796. Agenda 29.

October Term, A. D. 1924.

W. W. Watts, et al., Appellees,
vs.
The Moving Picture Machine Operators, etc., et al., Appellants.

Appeal from Sangamon.

NIEHAUS, J.

In this case, W. W. Watts, who is the owner of the Princess Theatre, the Gaity Theatre and the Vaudette Theatre, and Harry T. Loper, the owner of the Lyric Theatre, all located in the city of Springfield, filed a bill in equity in the circuit court of Sangamon county, against the appellant Moving Picture Machine Operators Protective Union, Local 323 of Springfield, Ill., International Alliance, Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, referred to in the bill for brevity, as the Union. The bill alleges, that the appellants and divers other persons unknown, entered into a conspiracy and confederation, to boycott and injure the Motion Picture business of the complainants by means of picketing, which involved intimidation by threats of the employes and patrons of the theatres; and acts of violence; and alleges specific and overt acts of violence and intimidation, carried out pursuant to the alleged conspiracy, which resulted in irremedial injury to the theatre business of the complainants. The bill prays for an injunction to restrain and prohibit the alleged picketing and boycott. A temporary injunction was granted, which restrained the appellants, and all persons acting, and affiliated, with them, from:

"1. In anywise, by force, threats or intimidation, interfering with, obstructing or stopping the business of complainants of their servants or employes in the maintenance, continuance and operation of their businesses.

(2) From compelling, inducing, or attempting to compel and induce, by threats, intimidation, force, physical violence or other unlawful means any of complainants' employes to fail or refuse to work for them or either of them or to leave their service (page 1)

(3) From preventing or attempting to prevent any person or persons, by threats, intimidation, force or physical violence, from freely entering into or continuing in the service of complainants.

(4) From preventing any person about to become a patron of complainants, by threats, intimidation, force, physical violence or other unlawful means, from freely entering the respective theatres of complainants.

(5) From compelling or inducing or attempting to compel or induce, by the use of threats, intimidation, force, violence, fraud or coercion, any person or persons in the employ of complainants to leave such employment.

(6) From congregating about, in or near the theatres or property of complainants, or either of them, for the purpose of threatening or intimidating or annoying the pedestrians and patrons entering or about to enter the places of business of complainants.

(7) From molesting, attacking, accosting, laying hold of or interfering with the employes and patrons of complainants, or from gathering and standing in front of the places of business of complainants or in the alleys, approaches, entrances thereto, for the purpose, by their presence, of threatening, intimidating or annoying the employes of complainants or the patrons of complainants or any person desiring ingress or egress from or to the places of business of complainants.

(8) From maintaining at or near the premises of the respective complainants any men or women for the purpose of picketing or of intimidating by threats, demeanor, violence or coercion, or any unlawful means, any patrons, persons about to become patrons, or any employe or future employe of complainants, or either of them.

(9) From directly or indirectly threatening, intimidating or coercing any person or persons for the purpose of preventing any such person or persons from attending and patronizing the theaters of complainants.

(10) From attempting, by threats, coercion, or intimidation, to prevent any person from freely contracting with or engaging in business with complainants, or either of them.

(11) From organizing or carrying on or maintaining a boycott against complainants, or either of them, by threats, coercion, or intimidation, to induce prospective patrons of complainants, or either of them, to abstain from attending the theaters, or either of them, of the complainants."

Thereafter the appellants made an alternative motion to either dissolve the injunction or modify the same, which was denied by the court. Appellants also filed a demurrer to the bill, which was overruled by the court; and they elected to stand by their demurrer; the court thereupon made the injunction permanent. An appeal was prayed and allowed.

The contention on appeal, is confined to the questions raised by the motion to modify the injunction. Appellants motion to modify was directed particularly for a modification of Item 8, of the restraining order; and this part of the motion is as follows:

"They move the court to modify the 8th item in the writ of and order of injunction, so that it be made clear and

definite that said order and writ of injunction does not forbid and prohibit the defendants from picketing in a peaceful and orderly manner upon the public streets of the city of Springfield, and while (page 2)

they are not guilty of any threats, violence, coercion, or any unlawful conduct towards the patrons of the complainants, or those about to become patrons, or towards their employes."

And the restraining order Item 8 referred to, is as follows:

"From maintaining at or near the premises of the respective complainants any men or women for the purpose of picketing or of intimidating by threats, demeanor, violence or coercion, or any unlawful means, any patrons, persons about to become patrons, or any employe or future employe of complainants, or either of them."

It is clear from the language used, that the picketing and intimidating against which the order is directed, is by threats, demeanor, violence or coercion, or of any unlawful means, which in law are considered breaches of the peace, and does not refer to picketing of peaceful and orderly character. The question of peaceful picketing was not involved in the order, and a modification was not required to make it clear that it was not directed against peaceful picketing. But assuming that the order itself was not clear and definite on this point, it might be pointed out, that the only picketing against which the order could be considered as directed, would be the picketing complained of in the bill. The allegations in the bill in that regard, are as follows:

"That in pursuance of such confederating and conspiracy, the said union, and the said members thereof * * * and divers other persons whose names are unknown to complainants, but whom complainants believe to be in some wise affiliated with said union, began and maintained a system of picketing of said theaters with pickets who went to and remained around or near to said theaters, and maintained watch upon their respective employes thereof as they went to and from their work, and also by going to their homes and accosting them upon the streets, and by the use of approbrious terms, language, names, and epithets, by intimidation, by threats, by coercion, entreaty and divers other ways endeavored to compel said employes to quit their employment; and said union and said individual defendants and others unknown to complainants did institute and carry on a boycott against said theaters, and the proprietors thereof, by threats, coercions, intimidation and picketing, and said pickets did by intimidation, threats, coercion and putting in fear, seek to prevent and did prevent persons desiring to enter said theaters and each of them, for the

purpose of viewing entertainments therein provided, from so doing."

The allegations of the bill clearly show, that the picketing complained of, to which the injunction was directed, was not peaceful picketing. It is evident therefore that the matter of peaceful picketing was not involved in the controversy; and it was not within the scope of the bill or the restraining order. The modification asked for by the motion was not only superfluous and (page 3)
unnecessary, but outside of the subject matter of the suit. Therefore there was no error in the denial of the motion; nor in making the injunction order permanent. The decree is affirmed.

Decree affirmed (page 4).

General No. 7812. Agenda 41.

October Term, A. D. 1924.

H. A. Kohler, P. A. Kohler, A. B. Kohler and C. E. Kohler,
Appellants,
vs.
George Boomgarden, Appellee.

Appeal from Ford.

NIEHAUS, J.

In this case the appellants, H. A. Kohler, P. A. Kohler, A. B. Kohler and C. E. Kohler, co-partners under the firm name of Kohler Bros., obtained a judgment by confession against George Boomgarden on three judgment notes in the circuit court of Ford county on October 22, 1923, for the sum of $898.01. The judgment notes on which judgment was based, had been executed by the appellee with a warrant of attorney to confess judgment, on Nov. 24, 1922; one note being for $200.00, due in six months after date; another note for $200.00, due Dec. 15, 1922; and the third note for $420.70 became due eight months after the date. After the entry of the judgment, the appellee made a motion to open up the judgment, and for leave to plead in defense, which was allowed. Thereafter he filed the general issue, and four special pleas. The first special plea alleges, that the notes were obtained by the appellants by fraudulent representations; the second special plea also avers, that the notes were obtained by fraudulent representations; also, that he signed the notes under duress. The third plea alleges, that there was no consideration for the notes; and the fourth plea constitutes a claim of set-off. The appellee alleges in the fourth plea of set off, that the appellants owed him $200.00 for 200 bushels of oats delivered by the appellee on August 15, 1919. The trial of the case resulted in a verdict in favor of the appellee, and against the appellants, for $56.86. This appeal is prosecuted from the judgment (page 1).

It is contended on appeal, that the evidence does not sustain the verdict; and that the verdict is manifestly against the weight of the evidence. The court instructed the jury, at the conclusion of the evidence, that the appellee had failed to prove, that the notes in question were obtained by fraud; also that the appellee had failed to prove, that the notes were obtained from the appellee by compulsion or duress. The only issues remaining to be passed on by the jury, were want of consideration, and the claim of set-off referred to. The indebtedness for which the notes appear to have been given was a balance resulting from numerous busines transactions between the parties, from March 22, 1919, to January 1,

1921; and for which a statement of account had been rendered by the appellants to the appellee, in December, 1921. Concerning correctness of this statement, the appellee in his brief, makes the following reference: "The statement of account given by appellants to appellee, was correct, except, that he was not credited with 1000 bushels of oats, that he had delivered to appellants. So as stated by appellant, in his argument at page 16, that the main question of fact in the case is whether appellee delivered to appellants, oats for which they did not give appellee credit, is correct." From the foregoing comment it is evident, that the controverted question on the trial had reference to the delivery of oats to the appellants in the year 1919 or in 1920 for which appellee did not receive credit. The evidence in the record makes it apparent that the appellee did not establish this claim of set-off; and that on this issue the verdict is manifestly against the weight of the evidence; nor is there any reasonable theory of appellee's right to recover $56.86. The judgment is therefore reversed and the cause remanded.

Reversed and remanded (page 2).

General No. 7733. April Term, A. D. 1924. Agenda No. 47.

Luther J. Hall,
Appellee,

vs.

Edward F. Campbell,
Administrator of
the Estate of Horace
Barnett, deceased,
Appellant,

Appeal from DeWitt.

Certiorari denied

237 I.A. 664

Niehaus, J.

This is an appeal from a judgment recovered by the appellee Luther J. Hall, in the circuit court of DeWitt county, against the appellant, Edward F. Campbell, as administrator of the estate of Horace Barnett, deceased. The judgment is based on a claim of the appellee filed against the estate of the deceases, and which consists of a promissory note of the deceased, for the sum of $10000.00, payable one year after date, with interest. The case was tried de novo in the circuit court, on appeal from the county court.

It is contended by appellant: 1. That the note was not executed in the life of the maker, or by the maker. 2. That there was no delivery by the maker; nor acceptance by the payee, in the life time of the maker. 3. That there was a failure of consideration. 4. That the maker was not mentally competent to transact business at the time of making the note. 5. That the maker was unduly influenced by Luther J. Hall, and his wife Ada Hall, and others, to execute the note. 6. That Ada Hall was not the duly authorized agent of Luther J. Hall, and had no lawful authority to transact the business for her husband. 7. That the note was handed to Luther J. Hall by his wife, Ada Hall, after the death of the maker. 8. That the note was intended as a gift and was therefore void. 9. That the note was testamentary and void, Because not in compliance with the Statute of Wills. 10. That the note was intended as a substitute for a will, and void as a testamentary instrument.

Concerning these contentions it may be said, that the evidence in the record tends to show, that both the appellee and his wife rendered many and various services for the maker of the note, Horace Barnett, especially during the last years of his life; and during sickness and health; and particularly in the last sickness preceding his death, when he lived at the appellee's home, and was cared for there; and that the note was given by Barnett to compensate for such services. The evidence also tends to show, that he made out the note himself, and delivered it to appellee's wife for that purpose. The evidence also tends to show that the deceased maker at that time, was mentally competent to transact the business in which he was engaged. On the question of the proof however, attention must be called to the fact, that at the instance of the appellant, at the close of the case, the jury were directed by the court, to make certain special findings concerning certain controverted questions of facts; and the jury returned these special findings into court with their verdict. The special findings are as follows: 1. Was the note sued on delivered by Horace Barnett in his life time to the plaintiff, or his duly authorized agent for that purpose? Answer : Yes. 2. Was Horace Barnett at the time he signed the note sued on of sound mind and memory? Answer: Yes. 3. Was said Horace Barnett induced to make said note by reason of undue influence practiced upon him by either said Luther J. Hall or his wife, Ada Hall? Answer: No. These special findings are conclusive upon the main controverted issues submitted to the jury by the appellant, and are binding upon this court; inasmuch as there was no motion made in the court below, to set aside the special findings; and no error has been assigned on these special findings in this court. Brimie v. Belden Manf. Co. 287 Ill. 11. In this condition of the record therefore, it must be considered that the general verdict is in conformity with the ultimate facts as found by the special findings.

The appellant also urges a number of objections to each of the instructions given for the appellee, most of which are purely tech-

nical and hypercritical. It would serve no useful purpose, and would extend this opinion to an unnecessary and burdensome length to discuss the objections in detail. The instructions taken altogether as a series are substantially correct statements of the law, as applying to the facts in controversy; and the jury could not have been misled into any misconception of the law concerning the question of the agency of appellee's wife; or concerning the delivery of the note. Shaw v. Camp 160 Ill. 425; Maule v. Maule 312 Ill. 129; Standard Trust Co. v. Carlson 315 Ill. 451; see also Yazel v. Palmer 81 Ill. 82. We find no reversible error in this feature of the case.

It is particularly contended, that the court erred in instructing the jury to allow interest on the note in question at five percent from the date of the note, in the event they found for appellee. There was no error in this instruction inasmuch as by the terms of the note, it was to draw interest from its date, without stating the rate of interest; and therefore the legal rate would be presumed to have been intended by the maker. It is also contended, that the court erred in allowing Ada Hall, the wife of appellee, to testify. It is sufficient to point out concerning this contention, that she was not called as a witness to testify for her husband, but was called to rebut a conversation attributed to her by Lyman T. Barnett, who was a witness for appellant, and one of the brothers and legal heirs of the deceased; and the conversation testified about by Lyman T. Barnett, was a matter that had no bearing on the issues in the case; and was wholly immaterial in the determination by the jury of the ultimate facts. Under these circumstances, even if the wife was incompetent, as a witness, the admission of her testimony would not be reversible error. The record does not disclose any reversible error.; and the judgment is therefore affirmed.

Affirmed.

General No.7782. October Term, A.D.1924 Agenda No.17

The People of the State of Illinois, ex rel David Norris, Commissioner of Highways of Kinderhook Township, being Township Fourth South, Range Seven, West of the Fourth Principal Meridian, County of Pike and State of Illinois, and Frank Saxbury, Commissioner of Highways of Cincinnati Township, being Township Five South, Range Seven West of the Fourth Principal Meridian in said County and State,

Appellants,

vs.

James C.Gay, James Inman and Layo W.Meyer, Commissioners of the Sny Island Levee Drainage District of the Counties of Adams, Pike and Calhoun, in the State of Illinois, and by virtue of their office, Commissioners of McCraney Creek Sub-District of said Sny Island Levee Drainage District,

Appellees,

237 I.A. 664

Appeal from Pike.

Niehaus, J.

In this case, a petition for mandamus was filed by The People, etc., ex rel. David Norris, Commissioner of Highways of Kinderhook township, and Frank Saxbury, Commissioner of Highways of Cincinnati Township, in the county of Pike, against the appellees James C.Gay, James Inman and Layo W.Meyer, Commissioners of the Sny Island Levee Drainage District, and ex officio commissioners of McCraney Creek Sub District of said Sny Island Levee Drainage District. The petition alleges, that the McCraney Creek Sub District was duly organized in the county court of Pike county under the provisions of the Levee Act; and that the appellees by virtue of their offices as commissioners of the Sny Island Levee Drainage District are the duly authorized commissioners of said Sub District; "that there is and has been, for more than twenty years last past a public highway of the width of sixty feet running east and west on the township line between sections thirty-three (33) and thirty four (34) in said Kinderhook township, and sections three (3) and four (4) in said Cincinnati

township, which said public highway, prior to the committing of the grievances hereinafter mentioned, was in good repair and accommodated all public travel.

That the purpose of the organization of said McCraney Creek sub-district was to excavate a channel and construct levees on either side of said channel, in order to confine the waters of said creek within said channel and between said levees; that the then commissioners of said McCraney Creek sub-district after the organization of said sub-district and prior to the year 1922, made and excavated, or caused the same to be done, a large drainage ditch,to-wit, of the width of fifty feet and of the depth of eight feet, over and across said public highway on the south side of said section thirty-four and the north side of said section three, near the southwest corner of said section thirty-four, which said drainage ditch crossed said public highway at a point where there was no channel depression or water course.

That said commissioners of said sub-district made and constructed or caused the same to be done, a large levee, to-wit, of the height of 12 feet, across said public highway, about 75 feet west from where said drainage ditch crossed said public highway; that the then commissioners of said sub-district also constructed or caused the same to be done, another levee of large dimensions, to-wit, of the height of 10 feet, across said public highway, at a point about 80 rods east of the southwest corner of said section thirty-four, and that across said public highway and immediately east of the levee last aforesaid, they constructed another drainage ditch or channel across said public highway at a point where theretofore there had been no channel, depression or water course which ditch and channel last aforesaid was constructed for the purpose of caring for the waters that were conveyed to that point through and by means of a ditch or artificial water course constructed by said commissioners and extending east on the north side of said public highway to near the south east corner of said section thirty-four, thence north a distance of about 80 rods.

That the excavation of said two ditches and the construction of the two leeves aforesaid across and over said public highways rendered the same impassable and unfit for public travel; that said commissioners of said McCraney Creek Sub-district attempted to restore said highway to a condition suitable for public travel, and constructed an approach of earth on the west side of said levee crossing said highway near the southwest corner of said section 34, which said approach when completed was so steep and so improperly constructed as to render said highway on that account unfit for public travel.

That said commissioners of said sub-district also constructed and erected a wooden trestle work extending from the top of the levee last aforesaid in an easterly direction to the west bank of said drainage ditch or channel, which said trestle work is supported by four bents of wooden piling, driven into the ground, which bents are a long distance, to-wit, sixteen feet apart, and that the ends of the wooden stringers rest upon said bents or piling, and across said stringers oak boards are laid as a flooring; that said piling and stringers are insufficient both in number and in size, and said stringers are not of sufficient strength and not sufficient in number to carry and support the weight of the loads and the machinery which prior to the construction of said drainage ditch and levees were accustomed to travel on and over said highway.

That the east end of said trestle work connects with an iron or steel bridge of the length of 40 feet, which said bridge is supported at either end by two iron tubes, 18 inches in diameter, and each of said tubes is held in place at the bottom by setting or driving posts into the ground a shallow depth, to-wit, three feet, and said posts extending up into said tubes, a short distance, to-wit, three feet; and said tubes filled with concrete above said posts; that at the east end of said bridge there are no abutments or retaining walls, and planks are placed on the east side of and against the two iron tubes which support the east end of said bridge, and the earth from which the approach to said bridge at the east end is constructed pressing against said boards has caused said tubes to lean so that they do not now stand in a perpendicular position, as they were originally placed; that said tubes are improperly placed and constructed in this that said posts are now exposed to the air and elements, and will within the course of a few years rot away and leave said tubes without any support; that the floor of said bridge is constructed of two inch thick oak lumber, which boards are insufficient in thickness and in strength; that the stringers in said bridge are insufficient, both in number and in strength; that the planks on the trestle approaches is strong enough to carry a gross truck load of two tons, and on the bridge proper a load of 2-3/4 tons, whereas the thickness of the plank on said trestle and bridge and the spacing and strength of the stringers beneath said trestle and bridge should be such as to carry a, fifteen-ton load; that all of the steel parts of said bridge are not sufficient in size and strength to carry and support the maximum loads which bridges along public highways are accustomed to be called upon to support and carry; that said bridge is insufficient in this that it has a roadway of twelve feet, whereas the minimum width permitted under the rules and regulations of the State Highway Commission of the State of Illinois, is a width of sixteen feet.

That the approach to the east end of said bridge is constructed from earth, and the grading is so steep and has been constructed in such an improper manner, that it is impossible for a loaded vehicle to reach said bridge from the east; that the failure to build abutments or retaining walls at the east end of said bridge has caused or permitted the west end of the earth approach to wash and wear away to such an extent that it is impossible for a vehicle to pass from said bridge onto said approach or from the approach to said bridge.

That said commissioners attempted to restore said highway to a condition for public travel at the point where said drainage ditch was cut across said highway immediately east of said east levee, by erecting and placing there a bridge composed of wood and iron; that the materials composing said bridge are weak and insufficient in size and strength, and the bridge is so carelessly and improperly constructed, that it is wholly insufficient and inadequate to meet the requirements of the public in carrying vehicles and loads on and over said bridge; that by reason of the facts as hereinabove set forth, both of said bridges and said trestlework are dangerous and unsafe for public travel; that said bridges and said trestlework fail to comply with the law and the rules and regulations of the State Highway Department of the State of Illinois."

The prayer of the petition is for an order to direct the appellees as commissioners of the McCraney Sub-district to proceed forthwith to rebuild and reconstruct both of the approaches to the highway bridge in question; and to rebuild and reconstruct the trestle work, and the bridge of material of sufficient size and strength to restore the public highway referred in the peti-

tion, so as to be in a safe and usable condition, as it was prior to the time the construction of the drainage channel and ditch which was cut through the highway; and to require the bridges and trestle and approaches to be so constructed as to comply with the laws and rules and regulations of the State Highway Department concerning bridges constructed for highway purposes. The petition also contains a prayer that the appellees, as commissioners, and their successors in office be required to keep and maintain the approaches, trestle, and bridge in a reasonable condition of repair.

The appellees filed an answer to the petition, and thereupon there was a hearing by the court of and concerning the matters alleged in the petition. The evidence taken clearly establishes the fact, that the bridge in question, as well as the trestle, and the earth approaches thereto, do not meet the requirements of a safe and proper bridge for the restoration of the highway to public use for traffic and travel; and do not comply with the requirements fixed by the rules and regulations of the State Highway Department for the construction of safe and usable bridges for highway purposes. The lack of safety and strength of the bridge and trestle in controversy, and the lack of durability and proper construction of the approaches to the bridge, are delineated by the testimony of Wesley B.Walraven, a structural engineer connected with the Highway Division of the department of Public Works and Buildings, who inspected the bridge, trestle and appeoaches in question, at the instance of the State Highway Department. His testimony, concerning this feature of the case, is as follows:

> "When I inspected the bridge the condition of that so-called wing wall was much the same as in the Picture, Exhibit 2. The tube on the south side of that same approach is much the same type of general construction. The effect of flood waters on that embankment of earth at the east end of this bridge would be a large tendency to erode into the bank. From my inspection at the time I was there, I found that the earth fill at the east end of the bridge was about nine feet wide, and it was quite evident that the north side of the fill had sloughed off, due undoubtedly to erosion from the water. Nine feet would be the width of the traveled right of way. The minimum width of a bridge permitted

under the specifications of the State Highway department is sixteen feet clear roadway. The reason of that requirement is to permit the safe passage of two vehicles. The most common material used for the construction of an abutment and wing walls of bridges of this character is reinforced concrete. *** Those fastenings of the floor beams to these verticle posts are not made in accordance with the specifications and requirements of the State Highway department, in this respect: The specifications of the State Highway department state that when field connections are made with bolts that the bolts shall be turned to a driving set, and that the filed bolts shall be reamed. These holes are quite evidently not reamed, and the bolts were not turned bolts, and were not turned to a driving set. The thickness of the metal in the verticals is about one fourth inch, which is less than the minimum allowed by the State Highway specifications, for minimum members. That is a minimum member. Between the forty feet as I have stated there are two intermediate floor beams. Running along with the bridge are placed stringers, four of which are of the "I" beam section, and two of which are of channel section. These stringers carry the load from floor beam to floor beam. *** Those fastenings at the lower end of those perpendicular posts in this bridge do not comply with the requirements of the State Highway department. *** This bridge fails in other particulars than those already stated to comply with the state specifications.

The clear roadway is only 12 feet instead of a minimum of 16 feet required for bridges over ten feet in length; the longitudinal stringers of the steel span will safely carry a conservative load of only 11.78 tons, instead of 15 tons as required by the specifications. The trusses should be designed differently; the universal load should be 125 pounds per square foot of the roadway surface. I have calculations showing that the stress in the center panel of the lower chord of this bridge will be 31,100 pounds, while the rivets in the end of the member will carry only 27,450 pounds. The steel span is supported on steel tube abutment, which is in direct violation of the specifications.

The section tube at the east end of the bridge appears to be inaccurately filled, and is leaning out of line. The east approach grade is very steep and narrow and in poor condition at the end of the bridge and has been reduced to about nine feet width, and is dangerous for travel in certain weather or at night, and especially so when coated with ice. The abutment is not supported although the specifications require that all abutments be supported with earth approach fillers in place. There are no wing walls at the east end of the bridge. The earth fill is held insecurely in place by a few posts tied with strands of wire, back of which has been placed a quantity of stones. At flood stages the approach fill is subject to erosion by the water, and the approach is in a dangerous condition to travel. The cover plate of the end post and upper chord is only one-fourth inch thick while the specifications require a minimum of 5/16 of an inch. The gussett plates are one-fourth inch thick, while 3/8 gussetts are required. The channels of the end posts and upper chord are five inches deep, while a minimum depth of six inches is required for channels in minimum member. *** The metal in the posts is one-fourth inch thick, instead of the required minimum of 5/16 inch thick.

The lower laterals should be bolted to the stringers at each intersection, the right hand end of one floor beam to the left hand end of the other floor beam diagonally across the roadway, and not the beam parallel with the beam of the roadway, but running diagonally to the center line of the roadway.

These laterals are put in there to stiffen the bridge. The permanent lower laterals should be bolted to the stringer. The laterals on this bridge are not so fastened. The specifications require that the top chords of the lower trusses shall be securely braced at the channcel points by means of knee braces, or solidly and rigidly connected to the floor beams. The upper chord should be braced at each channel point by means of so-called knee braces which extend in a direction at right angles to the center line of the roadway running from the top of the top chord down and onto the ends of the floor beams, otherwise it forms a triangle on the outside of the post thereby bracing the post. This is a low truss bridge. The points of contact of the vertical posts are to the diagonal posts with the top chord, that is, those knee braces connect the top chord with the top of the vertical posts. These knee braces are not provided on this bridge. I regard them as an essential part of the bridge in order to constitute stress.

The specifications require that the outstanding legs or angles used for vertical posts shall not be less than three inches, and in this bridge the outstanding legs or vertical posts are two inches.

The chord chains on the steel truss is composed of two three-inch chains, instead of two five-inch chains. The floor is of two-inch material, a total of two inches thick, instead of a minimum of three inches, as prescribed, regardless of how closely the stringers are placed. The planks are not of uniform length, and the ends are not laid in a straight line. They will not support without undue stress a truck weighing more than 2.12 tons, total weight. The specifications state that the maximum pitch of rivets in line of stress for members shall not be more than 16 times the thickness of the outside plate. In this bridge the outside plate is one-fourth inch thick, therefore the rivets should be placed not more than four inches apart, however the rivets in the cover plates are six inches apart. In the main members the end tube plates have a length not less than the distance between the lines in the main members. The end tie plates have a length less than the distance between the lines connecting them to the flanges in the lower chord. Each end of each bottom plate is connected to the flanges or member by only two rivets instead of by not less than four, according to the specifications. There should be at least two rows of two cross rivets in this structure. Where bolts are used in place of rivets, the holes should be reamed parallel and the bolts turned to a driving set. At the top end of one of the center channel diagonals in the south truss one of the filed bolts is missing; and it is evident that the hole had been punched and made to fit.

Relative to the wooden approach to the bridge and the bents under this trestle work, beginning at the west end of the steel truss, we have first a bent which is fourteen feet three from the center line of the tubes; a second bent 15 feet from the center line of the first bent; and then the third bent 15 feet three to the fourth, 14 feet seven, to the fifth and last bent, which is 15 feet six inches. The last bent is what we might call the abutment bent, it is the end of the trestle structure. The total length of that trestle structure is 74 feet 9 inches from the center line of the west bent.

In that distance there are 5 vents, with 3 piling in each bent. Those piling are on a slope from the west and down to the stream, so that they vary in height from perhaps three feet to eight feet. Those piling are somewhat irregular in size, but would average about 10 inches in diameter. I cannot tell from inspection the depth to which they are driven. The strength of the floor and the strength of the stringers would depend on the depth to which those piling have been driven.

In this structure, a table cap 12 inches by 12 inches is placed upon the piling in each bent. On that cap, longitudinal stringers, apparently fir, of the actual section 13 1/2 x 3 5/8, or a 4 x 14 nominal section. There are five ofthese stringers to each bent,two on the outside, approximately 12 inches center to center, and three intermediate. These stringers average three feet apart, and are supported by resting upon the caps. The wood stringers at the east end of the east bent rest upon a timber which is placed along the lower flange of the end floor beam or truss. That timber is approximately 4 x 6 inches, and is bolted to the "I" beam. That timber appears on the picture, Petitioner's Exhibit 5. It shows it is attached to the "I" beam by bolts. Six bolts are shown in the picture. There is approximately four inches space for the east end of those stringers. I should consider four inches of bearing for a timber stringer as rather insufficient bearing, especially when that bearing is upon a block.

The security and strength of that depends upon the firmness and strength of the bolted timber upon which they rest, but I should assume that the block along the stringer was strong enough of itself. In the event of decay it would be quite apparent that the end of the stringer would slip down. On top of those stringers. floor two inches thick, are placed. Their maximum width is 12 inches. The spans of those trestle bents vary. I measured the distance center to center of those bents, and I found them to vary between fourteen feet three as a minimum and fifteen feet three as a maximum, and the distance between the supports will alter the stress calculations for a given system of loading. In computing to determine the maximum load which that approach will carry I had to assume a distance center to center. I did not assume the maximum center to center, and therefore my results vary. Assuming a span center to center of fifteen feet three, and assuming a two inch plank, total thickness, I am not speaking of two-inch nominal section, assuming the dead load of the plank and the lead load of the stringers, I computed the maximum engine allowed on those stringers to be 10.25 tons. This is based upon an example that has been borne out by the best practice and by the experience of trained investigators that with a truck similar to the trucks in present use coming upon a floor system such as has been here described, that the load on the rear wheel will be distributed as to two stringers, that is the two rear wheels loads will be carried by four stringers. *** I figured that the maximum load which should come upon that bridge should not exceed 10.25 tons engine load, plus the net load of the stringers themselves. Concerning the floor, computing the stresses, I find that the maximum engine load, the maximum weight of the entire truck which should be allowed on this bridge should be 2.12 tons placed upon the planks. The stringers themselves are strong enough to carry

a 10.4 ton truck. My first computation went to the matter of stringers, and my last computation goes to the matter of the floor. I did not compute the load which plank on the steel structure would carry. I was then referring to the plank on the trestle. There are six stringers on the bridge, and five on the trestle, making the space center to center greater on the trestle, which decreases the carrying capacity, on the trestle.

However, I know from calculations which I can verify that the load which the plank on the bridge structure proper should not be loaded beyond three tons. The state specifications require a minimum of three inches in thickness of plank on bridges of this character. The three inch plank is 21/4 times the strength of a two inch plank. That being true, a truck weight of 4 3/4 tons or 4.77 tons could be used on this bridge if there were three inch planks instead of two-inch on the trestle. Assuming that it had the three-inch plank, the minimum requirements of the state law are for a 15 ton concentration, and 4.77 taken from 15 would be 10.23 tons short, not to spead of the fact that the stringers should be placed not farther apart than 2 feet 6 inches, and these are 3 feet apart. I should say a twelve ton weight of engine will average about what is used in this section. The total weight of engine that this bridge as now constructed, would safely carry is 2.12 tons.

The birdge would carry the average load of wheat."

The court, upon consideration of the proofs, entered an order requiring the appellees, as commissioners of the Sub-district, to forthwith proceed to restore the public highway in question to a condition which would be safe for public travel, and for the usual traffic thereon, by reducing the grades, and widening both of the earth approaches to the bridge in question, to such an extent, that they will be made fit for highway purposes; and that they also re-construct the wooden trestle connected with said bridge; that the stringers and flooring thereof will be of sufficient strength and size to make safe the public travel across and over the trestle work; and that they also re-construct the bridge in question, so that the stringers and the flooring of the bridge would be of sufficient size and strength to support and render it safe for public travel thereon, and over the same; also that the west end of the earth approach, which connects with the bridge in question, be so constructed, that the earth constituting the approach will be retained in place; and so as to render the approach at the point where it connects with the bridge safe for public travel. The court denied the prayer of the petition, for

for the maintenance and repairing of the bridge, trestle and approaches, by the appellees. The commissioners prayed an appeal from the order of the court.

When the commissioners of a drainage district cut a ditch across a public highway, in carrying out their drainage plan, it is their legal duty to restore the highway to a fit condition for travel; and if such restoration requires the erection of a bridge, they must construct one, which meets the requirements of safe travel and traffic on the highway. Gard v. Dolbeare 223 Ill. App. 496. We are of opinion that the court was fully warranted from the evidence, and did not err, in directing the appellees as commissioners of the drainage district in question, to re-construct the bridge, the trestle and approaches to the bridge referred to, so as to put them in a safe and proper condition, so as to meet the requirements of traffic and travel and necessary for a restoration of the highway. Nor, was there any error in denying that part of the prayer of the petitioners for the maintenance and repair of the present bridge,trestle and approaches.

The question of the maintenance and repair of the present bridge, trestle and approaches is not now involved; and does not arise until after the appellees have constructed a bridge,trestle and approaches, which will meet the legal requirements of a restoration of the highway.

For the reasons stated, the order and judgment is affirmed

Affirmed.

4474

General No. 7794. Agenda No. 56.

October Term, A. D. 1924.

237 I.A. 664

In the matter of the Estate of John Paul, Deceased.) Appeal from McLean.

Niehaus, J.

In this case Phil Wood, the executor named in a will of John Paul, deceased, filed his petition in the probate court of McLean county, to admit the will of the deceased to probate. Thereupon William C. Paul, the son of the deceased testator, who had previously had himself appointed administrator of the estate, appeared in court, and filed a motion to strike Wood's petition from the files; and in support of his motion also filed as affidavit setting forth certain facts, as reasons for the motion. The court denied the motion, and admitted the will to probate; an appeal was thereupon prayed and allowed, to the circuit court of McLean county. A motion was there made by the appellant William C. Paul, to require security for costs. This motion was denied; and the denial of the motion is assigned as error. The appellant thereupon renewed his motion, based upon the affidavit referred to, to strike the petition from the files. which the court also denied; and then proceeded to hear the testimony of the witnesses to the will, and the will was admitted to probate. This appeal is prosecuted from the orders and judgment of the circuit court in that regard.

The transcript record does not contain the petition filed by Wood, but it is apparent, that he filed the petition because he had been named as executor in the will. In view of this fact, this court cannot assume, that he filed the petition acting as the representative of some person who was a non resident; but must conclude, that he filed it in his own behalf, to have the will probated, to make effective his appointment as executor in accordance with the wishes of the testator. It is conceded, that Wood

is a resident of McLean county; and therefore Sec. 1 of Chapter 33 of the Revised Statutes requiring security for costs, cannot be considered as applying to this proceeding. The motion for security for the costs, was properly denied. The other motion, to strike the petition for the probate of the will from the files, was also properly denied. The petition for probate of the will, not being set forth in the record, this court must presume, that it complied with all the requirements of the statute, and contained all necessary averments with reference to the parties interested, and statements of facts pointed out by the statute, upon which the petitioner was legally entitled to ask, that the will in question be probated. This presumption view of the matter is sustained by the fact, that no question is raised about the legal sufficiency of the petition, either in form or substance. The only question therefore, presented for consideration is, whether the affidavit filed, and the exhibits attached thereto, show any legal basis for sustaining appellant's motion. The affidavit states that John Paul died a widower, on the 30th day of December 1923, and that William C. Paul is his only surviving child and heir at law; that the deceased was a resident of Germany from August 1906 to April 1923; and that on the 28th day of June 1918 after the close of the war between the United States and Germany, the alien property custodian appointed by the President under the "Trading with the Enemy Act," determined that John Paul came within the provisions of the act; and that he had the status of an alien enemy thereunder; and that he therefore seized certain personal property, namely, notes, and a mortgage securing the same amounting in value to over $10000.00; that the property seized, was all the property the deceased had in this country at that time. The affidavit also sets up certain proceedings in the circuit court of McLean county in relation to the foreclosure of the mortgage by A. Mitchell Palmer the alien property custodian; and the report of the Master in Chancery; and Court orders in relation thereto, in which the right of the alien property custodian to foreclose the mort-

gage, and to acquire the property under the act referred to, were sustained. None of these matters however, have any relevancy to the right of the petitioner to file his petition for the probate of the will in question. The record also shows, that the will in question was made in April 1923, after the deceased had returned to this country, and had again become a resident thereof, claiming citizenship; and after the treaty of peace between this country and Germany, restoring friendly relations between the two countries had been signed, and ratified by both countries, and had become effective. The will was made under the same conditions therefore, as if there had never been a war between the United States and Germany. John Paul's legal right to make the will cannot be questioned on that ground. Nor did the fact that there had been a war with Germany, which occasioned the seizure of his property, affect Paul's right to make a will, nor affect its validity; and it may also be pointed out inthis connection, that although the seizure by the alien property custodian of John Paul's property may have included apparently all the property which he owned at that time, that it does not follow as a necessary conclusion, that he did not have or acquire other property afterwards; nor did the amount of the property which he had or the condition of his property; or the legal right to claim it or possess it, affect his right to make a will; nor would it affect the right of the petitioner to have the will probated; nor would such right be affected by the fact, that some or all of the beneficiaries named in the will were aliens. None of the matters set up in the affidavits and the exhibits attached thereto, therefore, furnished a legal basis for striking the petition from the files. For the reasons stated, appellant's motions were properly denied; and the judgment of the court is therefore affirmed.

Judgment affirmed

44 75a

General No. 7810. Agenda No. 50.

October term, A. D. 1924.

2371 A. 664

Lee Tire and Rubber Company, Appellant, vs. John T. Brown and R. A. Balcom, Appellees,	Appeal from County Court Sangamon County.

Niehaus, J.

This proceedings was instituted by John T. Brown and R. A. Balcom, partners doing business under the name of General Tire Company, in the county court of Sangamon county, for the purpose of trying the rights of property of certain property levied upon by the appellant, the Lee Tire and Rubber Company, under a judgment recovered against George Graham. During the trial of the case an amendment was allowed by the court, eliminating John T. Brown from the proceedings, and resting the claim of ownership of the property in question in the appellee, R. A. Balcom. A jury was waived, and the case was tried by the court. After hearing the evidence, the court found the right to the property to be in the appellee, and entered a judgment accordingly. This appeal is prosecuted from the judgment.

The property levied upon in the two levies made by the sheriff of Sangamon county, consisted of forty four automobile tires, which at the time of the levy, were in the appellee's place of business in Springfield. The matter to be passed upon in review is referred to in appellant's brief as a question of fact; and as stated in the brief, "there are no serious legal questions involved, more particularly a question of fact, as to whether the tires which were levied upon are really the tires that were sold by George Graham in violation of the Bulk Sales Law."

It is contended by appellant, that the tires are the original tires, which the appellant had sold to Graham, and which Graham had sold and disposed of with the major part of his stock of merchandise to a man by the name of Ward, in violation of the Bulk Sales Law. The appellee testified, that he

had purchased the tires levied upon from D. N. James, doing business at 1325 South Fifth Street in the city of Springfield. The question therefore resolves itself into a matter of identification of the tires levied upon, to be the same tires which the appellant had sold to Graham; and that they are also shown to be a part of the merchandise which Graham sold in bulk to Ward. The record discloses some proof tending to show, that the tires were the same; but the proof of the identification is clearly insufficient to establish both of the necessary elements of proof. In this state of record, the finding of the court was proper, and should not be disturbed on appeal. The judgment is therefore affirmed.

Judgment affirmed.

General No. 7817 October Term, A. D. 1924. Agenda No. 44

237 I.A. 664

Chester L. Blakeman,
Appellee,

vs.

Illinois Power & Light Corporation, a corporation,
Appellant,

Appeal from Morgan.

Niehaus, J.

This suit was brought by Chester L. Blakeman, the appellee, in the circuit court of Morgan county, against the appellant, Illinois Power & Light Corporation, to recover damages for personal injuries suffered by the appellee; and for injuries to his automobile, which are alleged to have resulted in the city of Jacksonville at the intersection of South Main Street and East Morton Avenue, from a collision of appellant's street car, with appellee's autimobile. The declaration filed charges general negligence in the operation of the street car in question; also charges, that the street car in question was driven at an excessive rate of speed toward the intersection when the collision occurred; also, that the appellant failed to keep a proper lookout on approaching the intersection; and failed to give any warning of the approach of the street car to persons using the intersection. The appellant pleaded not guilty to the charges of negligence; and there was a trial by jury; and a verdict finding the appellant guilty, and assessing appellee's damages at $3500.00. Judgment was rendered on the verdict; and this appeal is prosecuted from the judgment.

The principal questions argued for reversal of the judgment are, that the verdict is manifestly against the weight of the evidence; and that there is no evidence tending to prove due care and caution on the part of the appellee; and that therefore the court should have directed a verdict for the appellant at the close of the evidence. There is no merit in the appellant's contention, that there is no evidence tending to show

the exercise of due care on the part of the appellee. The appellee, Blakeman, testified concerning this feature of the case;

> "I was coming in from Springfield to Jacksonville; came in on Morton Avenue and as I was going west on Morton Avenue I came around there very slow trying to make that corner and I turned the corner very slow. As I turned on the corner I was hit by a street car. Morton Avenue runs east and west. ** Main street runs north and south. ** My car was a closed car. It was a very cold night. Kind of dark night. There was not any lights to amount to anything around. ** As I came to the intersection and attempted to turn the corner, I was traveling very slow; about four or five miles per hour. My car had lights on it and they were lighted. The accident was about 8.15. As I came up to Main street and before going upon it as I neared it I looked through the filling station there. I first looked to my left and then I looked through the filling station to see if I could see anything. I knew there was a car track upon Main street. I did not see anything approaching the intersection of Main and Morton streets. As to how far I got into Main street before I was struck I had just made a nice turn about ten feet. When I say ten feet I refer to the rear end as to being ten feet in Main street. ** As to seeing the street car approaching that struck me, a very few feet after I turned- was all- . As to what I did to prevent being struck by the street car I was blowing my horn. I did not have time to do anything. I had brakes on my car. I used them in coming around the corner, slow. As to the condition of the brakes, when I saw the street car, well they managed to hold my car down to that speed that I could take care of it. I had my foot on the brakes. The brakes worked. They were off at the time the street car hit me. I was trying to get out of the way. That car was going 25 or 30 miles when I saw it coming. I did not hear any bell sounded."

Whether the appellee's testimony was truthful concerning the precautions which he claims to have taken, to ascertain the approach of a street car, was a question for the jury; and it was also a question for the jury whether the precautions were sufficient to satisfy the legal requirement of due care, namely, such care for his own safety as an ordinarily prudent person would exercise under the same or similar circumstances. Schneeweiss v. Illinois Central R. R. Co. 196 Ill.App. 248. And in this state of the evidence, the court properly denied appellant's motion to direct a verdict for the appellant. Nor can we agree with the appellant's contention, that the verdict is manifestly against the weight of the evidence. A careful review of the testimony of the witnesses in the record, makes it clear, that the jury were fully warranted in reaching the conclusion that the appellant's street

car approached the street intersection in question at an excessive rate of speed; and without giving any warning of its approach. A court of review in this situation would not be justified in reversing a judgment on the grounds stated.

It is also contended, that the first instruction given for the appellee is erroneous, because the jury were told in the instruction, that the care required of the appellee, in driving his automobile, was such care as an "ordinarily prudent automobilist" would exercise; instead of saying an "ordinarily prudent person" would exercise. It must be pointed out however concerning this contention, that every automobilist is a person, and that the word automobilist was undoubtedly used in that sense; and that the jury could not have been misled into thinking that a different rule prevailed with regard to the care to be exercised by an automobilist, than prevailed with reference to any other person. Technicially the word "person" was the proper one to use; but we are of opinion that in this case, and in view of the other instructions on this point that no harm could have resulted by substituting the term"automobilist" in the instruction mentioned. The error cannot therefore be regarded as reversible. The record does not disclose any reversible error, and the judgment is affirmed.

Judgment affirmed.